(12)

No. 01-1862-CFH Title: Jeanne Woodford, Warden, Petitioner
v.
Robert Frederick Garceau

Docketed: June 24, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 30 2002	Application (01A855) to extend the time to file a petition for a writ of certiorari from May 16, 2002 to June 15, 2002, submitted to Justice O'Connor.
	May 8 2002	Application (01A855) granted by Justice O'Connor extending the time to file until June 15, 2002.
	Jun 13 2002	Petition for writ of certiorari filed. (Response due July 24, 2002)
	Jun 13 2002	Appendix of petitioner filed.
	Jul 23 2002	Brief of respondent Robert Frederick Garceau in opposition filed.
	Jul 23 2002	Motion of respondent for leave to proceed in forma pauperis filed.
	Jul 23 2002	Appendix of respondent filed.
	Aug 7 2002	DISTRIBUTED for Conference of September 30, 2002
	Sep 23 2002	Reply brief of petitioner Jeanne Woodford, Warden filed.
	Oct 1 2002	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Oct 1 2002	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT January 21, 2003. **********
	Nov 13 2002	Joint appendix filed.
	Nov 13 2002	Brief of petitioner Jeanne Woodford, Warden filed.
	Nov 13 2002	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Dec 4 2002	Record filed.
	Dec 4 2002	Record filed.
	Dec 7 2002	CIRCULATED.
	Dec 10 2002	Order extending time to file respondent's brief on the merits to and including December 20, 2002.
	Dec 16 2002	Brief amicus curiae of Assn. of the Bar of the City of New York filed.
	Dec 20 2002	Brief of respondent Robert Frederick Garceau (TBP) filed.
	Jan 10 2003	Reply brief of petitioner Jeanne Woodford, Warden filed.
	Jan 21 2003	ARGUED.

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No. 01A855

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held that the Antiterrorism and Effective Death Penalty Act (AEDPA) (28 U.S.C. § 2241, *et seq.*) did not apply to cases which commenced prior to the AEDPA's April 24, 1996, effective date. The circuits are split as to when a capital case commences for purposes of triggering the AEDPA. With one exception, all the circuits to consider the issue have found the AEDPA applies if the actual petition was filed on or after the AEDPA's effective date. However, in the Ninth Circuit, the AEDPA does not apply to a federal petition filed on or after April 24, 1996, if motions for appointment of counsel and stay of execution were filed before that date. *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). What is the correct trigger event for the application of the AEDPA in capital cases?

2. The Ninth Circuit applied a new rule of constitutional law to reverse the capital conviction in this case. The Ninth Circuit was indisputably on notice, from a source other than the prosecution, of the application of *Teague v. Lane*, 489 U.S. 288 (1989), but did not address it. The failure to address *Teague* conflicts with the Fifth Circuit's holding that, even where *Teague* is not raised, it is an abuse of discretion not to consider it, absent a compelling, competing interest of justice. *Jackson v. Johnson*, 217 F.3d 360, 361-63 (5th Cir. 2000).

A. Did the Ninth Circuit abuse its discretion in failing to consider *Teague v. Lane*, 489 U.S. 288?

B. Since the *Teague* issue is properly raised in the petition for certiorari, and presents a threshold issue for this Court's determination, should the Ninth Circuit's reversal of Garceau's capital conviction, based on the application of a new rule of constitutional law be vacated by this Court?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01A855

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

OPINION BELOW[1/]

Petitioner, Jeanne Woodford, Warden, California State Prison, San Quentin, represented by the State of California (the State), respectfully petitions for a writ of certiorari to review the December 26, 2001, order and opinion of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001) (No. 99-99022) (hereafter "*Garceau*") (Appendix A), which reversed the judgment of the United States District Court for the Eastern District of California dismissing Respondent's application for a writ of habeas corpus.

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. On December 26, 2001, the Ninth Circuit entered its order and opinion in *Garceau v. Woodford,* 275 F.3d 769, and, on February 15, 2002, denied rehearing and rehearing en banc. (Appendices A and B.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTE APPLICABLE TO THE FIRST ISSUE PRESENTED

This case involves the application of the Antiterrorism and Effective Death Penalty Act of 1996. Chap. 153, 28 U.S.C. § 2241-2255 (Appendix F), and that provision of Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c), which provides:

> (c) EFFECTIVE DATE.--Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

STATEMENT OF THE CASE

In 1987, Robert Garceau was convicted in Kern County Superior Court, California, of two counts of first degree murder. The victims were Garceau's girlfriend, Maureen Bautista and her 14-year-old son, Telesforo Bautista, who were both stabbed to death in September 1984.

Garceau challenged his conviction through a direct appeal to the California Supreme Court. The conviction was affirmed in *People v. Robert Garceau,* 6 Cal.4th 140 (1993), a published opinion issued on November 18, 1993. (Appendix E.) Although the California Supreme Court held that the trial

court erroneously instructed the jury that evidence of Garceau's other bad acts could be considered as it bore on Garceau's character, the court held it was non-prejudicial under any standard of review and did not decide if the instruction constituted a denial of due process.

Garceau filed requests for appointment of federal habeas counsel and stay of his execution on May 12, 1995. On April 24, 1996, the AEDPA went into effect. Garceau then filed his federal petition for habeas corpus on July 2, 1996. *Garceau v. Woodford*, 275 F.3d at 772. Ultimately, the federal district court denied Garceau's habeas petition

The Ninth Circuit Court of Appeals issued a published opinion, dated December 26, 2001, reversing the District Court's order and the underlying state conviction. Applying a newly-announced rule of constitutional law, the Ninth Circuit found an "other crimes" jury instruction to constitute prejudicial constitutional error. However, the panel opinion also noted that this Court "has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions." (Appendix A; *Garceau*, 275 F.3d 769.) Judge O'Scannlain's dissent stated that the rule of non-retroactivity in *Teague v. Lane* could have prevented the majority's conclusion. However, Judge O'Scannlain believed that the State had disavowed reliance on *Teague* at oral argument.

The State filed a petition for rehearing and rehearing en banc which was denied on February 15, 2002. The State raised the same claims now raised to this Court in the petition for certiorari. In its denial, the Ninth Circuit acknowledged its discretion to consider a *Teague v. Lane,* 489 U.S. 288 (1989), claim raised for the first time in a petition for rehearing, but declined to exercise that discretion. (Appendix B; *Garceau v.*

Woodford, 281 F.3d 919 (9th Cir. 2000).)

On February 25, 2002, the Ninth Circuit granted the State's motion for stay of mandate so that a petition for certiorari could be filed with this Court. (Appendix C.)

ARGUMENT

I.

THE APPLICATION OF THE AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL HABEAS PETITION WAS FILED. THE NINTH CIRCUIT'S CONTRARY INTERPRETATION RAISES A SPLIT IN THE CIRCUITS AND IS WRONG

There is a split in the circuits as to the correct trigger event to be used in determining whether the AEDPA applies to a petition for writ of habeas corpus filed in a capital case. With the exception of the Ninth Circuit, the circuits to consider the issue have found the AEDPA applies if the petition was filed on or after the AEDPA's April 24, 1996, effective date. However, the Ninth Circuit has found that the AEDPA does not apply to a federal petition filed on or after April 24, 1996, if motions for appointment of counsel and stay of execution were filed before that date. *Calderon v. United States District Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc).[2/] This petition for certiorari asks this Court to resolve the disagreement between the circuits as to the correct trigger event for determining the application of the AEDPA in capital cases.

In *Garceau v. Woodford*, 275 F.3d 769, requests for counsel and stay of execution were filed before the enactment

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2. *Kelly* overruled that portion of *Calderon v. United States District Court for the Central District of California (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), which used the filing of the federal habeas petition as the trigger date for determining whether the AEDPA's statute of limitations applied to a petition.

of the AEDPA, and the federal habeas petition was filed after enactment. The Ninth Circuit applied the rule announced in *Kelly* to find the provisions of the AEDPA – specifically those contained in 28 U.S.C. § 2254(d) – inapplicable to the case. *Garceau*, at 772, fn. 1. This permitted the Ninth Circuit to conduct *de novo*, rather than deferential, review of the California Supreme Court's adjudication of the due process claim raised. Moreover, it permitted the Ninth Circuit to extend and apply its own jurisprudence, rather than "clearly established United States Supreme Court precedent. The *Garceau* majority admitted that existing United States Supreme Court precedent had not found a due process violation under the facts presented in this case. *Garceau*, at 774-775. The failure to apply 28 U.S.C. § 2254(d) resulted in the granting of the habeas petition.

The Ninth Circuit's decision in *Kelly*, 163 F.3d 530, was wrongly decided. *Lindh v. Murphy*, 521 U.S. 320, provides that the AEDPA's provisions contained in chapter 153 (28 U.S.C. § 2241-2255), do not apply to "cases pending" at the time of the statute's enactment.[3] *Kelly*'s majority looked to *Hohn v. United States*, 524 U.S. 236 (1998), to determine the meaning of "cases pending." In *Hohn*, the denial of a certificate of appealability was deemed to constitute a "case" for purposes of Supreme Court jurisdiction under 28 U.S.C. § 1254. *Hohn* in turn relied on *Ex Parte Quirin*, 317 U.S. 1 (1942), which provides that a request for leave to file a petition for a writ of habeas corpus was a "case"over which the court of appeals could assert jurisdiction. Analogizing to *Hohn* and *Ex Parte Quirin*, the *Kelly* majority found an application for appointment of counsel under 21 U.S.C. § 848(q)(4), and a request for stay of execution to constitute a pending "case." Applying this precedent, the *Kelly* court felt compelled to find that:

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3. Chapter 153 does not contain Chapter 154's language making the latter's provisions applicable to cases pending at the time of the statute's enactment. 110 Stat. 1226, section 107(c).

> Like a request for leave to file a habeas petition, a petition for the appointment of counsel to prepare and file a petition for a writ of habeas corpus, accompanied by a motion for a stay of execution under *McFarland* [512 U.S. 849, 858 (1994)], is a threshold action that presents a "case" to the district court. By analogy to *Hohn*, it follows that a petition for appointment of counsel under *McFarland* creates a pending habeas case. [Fn. omitted.] Accordingly, we overrule those portions . . . [of contrary Ninth Circuit cases] that held that a habeas corpus case is pending only when the habeas petition itself has been filed. A petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, also suffices.

Kelly, 163 F.3d at 540.

Circuit Judge Cynthia Holcomb Hall dissented from the majority's reasoning in *Kelly*. Judge Hall found that the majority employs an "overbroad interpretation" of the Supreme Court's opinion in *Hohn v. United States*, 524 U.S. 236. *Kelly*, 163 F.3d at 544. "At the heart of the majority's error is its unreflective act of equating the word 'case' as used in *Hohn"* with the meaning of the word for purposes of determining whether the provisions of the AEDPA apply. *Id.* "[T]he words may appear the same, but their meanings are vastly different." *Id.*

> In *Hohn*, the Supreme Court was defining "case" for purposes of determining whether a court of appeals decision denying an application for a certificate of appealability under § 28 U.S.C. S 1253(c) constituted a "case" for purposes of Supreme Court jurisdiction under §28 U.S.C. 1254 and the "case or controversy" requirement of Article III. See 524 U.S. at ----, 118 S.Ct. at 1972.

Id. at 545. *Hohn*'s use of "case" is a significantly different context than defining "case" for purposes of determining

whether the AEDPA's statute of limitations applies, as was the situation in *Kelly*, 163 F.3d 530, and in *Beeler*, 128 F.3d 1283 (overruled as to the definition of "case" by *Kelly*).

As Judge Hall explained:

> Even if *Hohn* [524 U.S. 236] and *Beeler* [128 F.3d 1283] were using the word "case" to mean the exact same thing (which they were not), the cases are so factually distinguishable as to belie the argument that one "has vitiated" the other. In *Hohn*, the Supreme Court merely stated that a habeas corpus petition that had been ruled upon in the District Court but denied a certificate of appealability remained a case for purposes of a petition for certiorari. The case before us deals with a request for counsel and a stay of execution where no habeas petition had been filed, and thus there was nothing that could "remain" a case.

Kelly, 163 F.3d at 545.

Lastly, Judge Hall found that:

> The majority overlooks another underlying rationale in *Hohn*: that a certificate of appealability involves adversity. See 524 U.S. at ----, 118 S.Ct. at 1972. By overlooking this rationale, the majority can in conclusory fashion state that a petition for appointment of counsel accompanied by a motion for a stay of execution is a "case," even though indigents have the mandatory right to counsel under 21 U.S.C. § 848(q)(4)(B), see *McFarland v. Scott*, 512 U.S. 849, 854, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), and a stay of execution will usually be granted to allow counsel "meaningfully to research and present a defendant's habeas claims." *Id.* at 858, 114 S.Ct. 2568. Because the request for counsel and a stay did not involve true adversary proceedings, I would hold that, even if *Hohn* 's definition of a "case" applied to the proceedings before us (which it does not), no such case had been initiated before the statute of limitations expired.

Id. at 545.[4]

In all, four other federal circuits have rejected the reasoning underlying *Kelly*. The Fifth, Sixth and Seventh and Tenth Circuits have all used the filing of the habeas petition on or after April 24, 1996, as the trigger event for the application of the AEDPA. Using similar reasoning to that employed in Judge Hall's dissent, these cases reject *Kelly*'s trigger event and find its reliance on *Hohn*, 524 U.S. 236, *Ex Parte Quirin*, 317 U.S. 1, and *McFarland v. Scott*, 512 U.S. 849 (1994), to be misplaced. *See Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997); *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999); and *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999).

In *Garceau*, the case now before this Court, the Ninth Circuit's mistaken and unique interpretation of "cases pending" under the AEDPA was the difference in upholding or vacating a state court capital murder conviction. Other allegedly pre-AEDPA capital cases remain for the Ninth Circuit to consider. The Court should take this important, pivotal opportunity to correct the Ninth Circuit's erroneous legal analysis and resolve the existing split in circuit authority.

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4. For instance, the appointment of counsel and request for stay of execution was uncontested in this case.

II.

THE NINTH CIRCUIT ABUSED ITS DISCRETION IN GRANTING HABEAS RELIEF WITHOUT ADDRESSING *TEAGUE v. LANE*. THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS, ADDRESS THE APPLICATION OF *TEAGUE*, AND VACATE THE DECISION

Despite clear notice as to the application of *Teague v. Lane*, 489 U.S. 288, the Ninth Circuit ignored *Teague*, applied a new rule of constitutional law, and reversed a state capital conviction. In failing to apply *Teague*, the Court abused its discretion and demonstrated a split in the circuits as to the federal courts' handling of this issue.

In the state trial, the prosecution introduced prior crimes evidence with an instruction that the evidence could "be considered by [the jury] for any purpose, including but not limited to any of the following: [¶] *[Defendant's] character or any trait of his character*...." (Italics added.) *People v. Garceau*, 6 Cal.4th at 185. The California Supreme Court found that the instruction given "impermissibly invited the jury to consider certain evidence . . . for the purpose of establishing defendant's propensity to commit murder," but found the error harmless beyond a reasonable doubt, applying without deciding that the standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967) was applicable.[5] Thus, the California Supreme Court did not believe that any constitutional rule "dictated" consideration of this claim under the Federal Constitution. The state court found the evidence of guilt

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5. The State explicitly contended that the instructional error was solely a matter of state evidentiary law subject only to state harmless error analysis.

overwhelming and noted that the defense desired the admission of the evidence, although not the wording of the instruction. *People v. Garceau*, 6 Cal.4th at 187. The Ninth Circuit reversed after finding a federal due process violation. *Garceau v. Woodford*, 275 F.3d 769. (Appendix A.)

In finding a due process violation, the majority opinion acknowledged it was applying a rule left unaddressed by this Court:

> [T]he Supreme Court has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions, *see Estelle* [*v. Maguire*], 502 U.S. [62,] at 75 n. 5, 112 S.Ct. 475 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.")

Garceau, at 774-75.

Circuit Judge O'Scannlain, in his dissent, states, "[t]he majority forthrightly admits" that the Supreme Court has never expressly held that this error constitutes a due process violation. *Garceau*, at 781.

> [I]t is not clear that the majority could have reached this conclusion had it been forced to grapple with *Teague v. Lane*, 489 U.S. 288 . . . . Certainly, given that neither the Supreme Court nor this court has yet addressed the question that today's opinion answers, the state has at the very least a colorable argument that the majority today announces a "new rule" on which it cannot grant Garceau relief.

Garceau at 780, fn. 1 (citations omitted).

Teague v. Lane, 489 U.S. 288, which fully applies to capital cases, provides that federal habeas relief is unavailable if the claim rests on a "new rule" which was announced or would be created after petitioner's state appeal. A "new rule" "breaks new ground or imposes a new obligation on the State or the Federal Government" or "if the result was not dictated by precedent existing when the judgment became final." *Teague*, at 301; *Stringer v. Black*, 503 U.S. 222 (1992). *Teague* prevents the application of new constitutional rules not in existence at the time of finality because it

> seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.

Teague, 489 U.S. at 309.

In *Garceau*, the finding of a federal due process violation was based on the Ninth Circuit's pronouncement and application of a new rule of constitutional law. The state's reasonable good faith interpretation of the law, based on existing precedent, was undermined. *See Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("The 'new rule' principle ... validates reasonable, good-faith interpretations of existing precedents made by state courts.")

A. The Ninth Circuit Abused Its Discretion In Failing To Address *Teague*

The State did not raise *Teague* until the petition for rehearing filed in the Ninth Circuit and now in the petition for certiorari.[6] When asked about *Teague* during the Ninth Circuit

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6. If the State had raised *Teague*, the Court would have been required to address it as a threshold issue. *Graham v. Collins*, 506 U.S. 461, 466-467 (1993) (*Teague* analysis is

oral argument, the State acknowledged that it had not previously been raised. *Garceau* at 275 F.3d at 781, fn. 1.[7] Although the State did not itself raise *Teague*, there is no question that the Ninth Circuit was expressly on notice as to *Teague*'s application, given the comments by the majority and in Judge O'Scannlain's dissent, discussed *ante*.

Teague is not jurisdictional in the sense that a court has a *sua sponte* obligation to apply it. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Instead, where *Teague* has not been raised by the prosecution, the Court has discretion in deciding whether to address it. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). However, this Court should find that, under circumstances such as exist in *Garceau*, where the Court is expressly on notice of the application of *Teague*, albeit from a source other than the prosecution, and where the Court's creation and application of a new rule of law will result in the reversal of a state criminal conviction, it is an abuse of discretion for a federal court to fail to address *Teague*. The Ninth Circuit's decision to ignore *Teague* under these circumstances decided an important question of federal law in a way that should be settled by this Court. Sup. Ct. Rule 10 (c).

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ordinarily our first step when we review a federal habeas case); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

7. The State disputes the claim that the State's counsel, at oral argument, "declined to raise" *Teague* (*Garceau*, 275 F.3d at 781, fn. 1, dissent of Judge O'Scannlain), or "explicitly declined to invoke *Teague*" (*Garceau v. Woodford*, 281 F.3d 919), denial of petition for rehearing and rehearing en banc) to the extent this infers that an express waiver of *Teague* occurred. The State's counsel at oral argument simply stated, "*Teague* has never been raised in this case," and "I don't know why *Teague* has never been raised in this case." (*Garceau*, 275 F.3d at 781, fn. 1.) There was no express *Teague* waiver. Indeed, that question was never asked or addressed at oral argument.

The Ninth Circuit's failure to address *Teague* also is in conflict with the Fifth Circuit's approach in *Jackson v. Johnson*, 217 F.3d 360, 361-63 (5th Cir. 2000). In *Jackson*, the Fifth Circuit stated that,

> absent a compelling, competing interest of justice in a particular case, a federal court should apply *Teague* even though the state has failed to argue it. Fundamental principles of fairness are not the states' to waive.

Id.

The position taken by the Fifth Circuit in *Jackson*, 217 F.3d 360, is based on the principles underlying *Teague*, which include concerns about finality and comity in state court convictions. *Jackson* concluded that rules created to foster comity are traditionally made waivable by the states on a case-by-case basis. On the other hand,

> [c]oncerns about the finality of judgments and the evenhanded application of justice, however, are invoked for the purpose of protecting the philosophical and moral foundations of our entire judicial system. Every state ought to be concerned with preserving those foundations, but the interests in question are not unique to any particular state and therefore are not properly entrusted to the keeping of the states on a case-by-case basis.

Jackson, 217 F.3d at 362.

Jackson also properly noted that *Teague* recognized that treating similarly situated defendants differently

> exacts an unavoidable moral cost on our judicial system. *Teague*'s goal of achieving the uniform dispensation of justice cannot be achieved, however, unless the courts take it on themselves to apply a single retroactivity standard uniformly. Thus, the *Teague* nonretroactivity rule is not an affirmative defense in the traditional sense of that term; rather, it is a vehicle for the vindication of a fundamental principle of justice.

Jackson, 217 F.3d at 362-63.

The *Jackson* approach to *Teague*, particularly where a federal court is on notice as to its application, and a state capital conviction is at stake, should be adopted by this Court. Given the important principles underlying *Teague*, federal courts should not be free to apply or ignore its restrictions at will.

B. The Ninth Circuit's Reversal Of *Garceau's* Capital Conviction Is Improperly Based On A New Rule Of Constitutional Law And The Decision Should Be Vacated By This Court

The prosecution has raised the application of *Teague v. Lane*, 489 U.S. 288, in this petition for certiorari. Despite the late assertion of this issue, the *Teague* issue is now properly before this Court. *See Schiro v. Farley*, 510 U.S. 222, 228 (1994) (*Teague* not addressed because not raised in lower federal court *or* in petition for certiorari. Court recognized that "the State, as respondent, is entitled to rely on any legal argument in support of the judgment below. [Cite omitted.]"); *Godinez v. Moran*, 509 U.S. 389, 397 (1993) (*Teague* not considered because not raised in lower courts *or* in his petition for certiorari.)

The proper application of *Teague* would have prohibited the Ninth Circuit's reversal of Garceau's capital conviction. As the Ninth Circuit acknowledged, existing United States Supreme Court precedent at the time Garceau's conviction was final, had not declared a due process violation under these circumstances. See discussion, *ante*. In this case, there was no possibility that reasonable jurists would have found the analysis applied, and outcome reached, by the Ninth Circuit to be dictated by precedent. *See Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Therefore, the Ninth Circuit's

decision was improperly based on a new rule of law.

The California Supreme Court's analysis was consistent with this existing precedent and deserved to be upheld by the federal court. The California Supreme Court found that the instruction given "impermissibly invited the jury to consider certain evidence . . . for the purpose of establishing defendant's propensity to commit murder," but found the error harmless. *People v. Garceau*, 6 Cal.4th at 187. Although the California Supreme Court did not determine whether it was applicable, the Court did find that any error would be harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. at 24 (1967). This Court should grant this petition for certiorari and apply the principles of *Teague* to uphold the Court's good faith application of the existing law.[8/]

---

8. If this Court agrees with the State's *Kelly*, 163 F.3d 530, argument (Argument 1), then the deferential review standard of 28 U.S.C. § 2254(d) applies to this case. For all of the reasons set forth in our *Teague* analysis (Argument 2B), the California Supreme Court's adjudication of the claim involved a reasonable application of established United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: June 5, 2002

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 01A855 011862 JUN 13 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT FREDERICK GARCEAU,
No. 99-99022
Petitioner-Appellant,
D.C. No.
v. CV F-95-5363
OWW
JEANNE WOODFORD, Acting Warden
of San Quentin State Prison, OPINION

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted
May 17, 2001--San Francisco, California

Filed December 26, 2001

Before: Diarmuid F. O'Scannlain, A. Wallace Tashima, and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Tashima;
Concurrence by Judge Thomas;
Partial Concurrence and Partial Dissent by
Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Due Process

The court of appeals reversed a judgment of the district court. The court held that an "other crimes" jury instruction that allows the jury to use the evidence of a defendant's other crimes to establish his criminal propensity for the charged crime violates due process, when the balance of the prosecution's case against the defendant is not strong; the other crime is the same crime for which he is on trial; the prosecutor relies heavily on the other crimes evidence; and the other crimes evidence is emotionally charged.

Appellant Robert Garceau was convicted in Kern County, California, of first degree murder for the 1984 stabbing deaths of his girlfriend, Maureen Bautista, and her son, Telesforo Bautista. Their bodies were not found until six months later, in a bedroom dresser buried under a layer of concrete in the backyard of one of Garceau's drug partners, Greg Rambo. There was no physical evidence linking Garceau to the murders. The state's case against him consisted largely of the testimony of Garceau's drug partners, who testified that Garceau had confessed to them that he had killed the Bautistas. They further testified that Garceau murdered the Bautistas, he returned to the scene of the crime with two of his drug partners and stuffed the Bautistas' bodies into a bedroom dresser. Garceau and Greg Rambo then transported the dresser to Rambo's house. They buried the dresser under a layer of concrete in Rambo's backyard.

A few months later, Greg Rambo was shot to death. Prior to his trial for the Bautista murders, Garceau was charged with and convicted of Greg Rambo's murder and sentenced to 33 years to life imprisonment. At Garceau's trial for the Buatista murders, several of his drug partners testified that he had told them that he had killed Rambo as well. Virtually all of the prosecution's witnesses had some connection to the murder of the Bautistas or some other self-interested reason for testifying against Garceau. Garceau's defense at trial was that one or more of the drug partners killed the Bautistas. Garceau objected to the trial court's instruction that evidence of other crimes committed by Garceau could be used to establish his criminal propensity for the charged crime, including evidence that he manufactured illegal drugs and testimonial evidence that, several months after he allegedly murdered the Bautistas, he murdered Greg Rambo. The jury sentenced Garceau to death.

The California Supreme Court affirmed the conviction and sentence

and denied his state habeas petition on the merits. The district court denied Garceau's federal habeas petition, dismissing his claim that the other crimes jury instruction violated the Due Process Clause.

Garceau appealed his conviction and sentence.

[1] It is not a violation of due process to admit other crimes evidence, for purposes other than to show conduct in conformity therewith, when the jury is given a limiting instruction that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried. **[2]** The admission of other crimes evidence violates due process when: (1) the balance of the prosecution's case against the defendant was solely circumstantial; (2) the other crimes evidence, which involved the defendant's past use of knives, was similar to the stabbing for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was emotionally charged.

[3] The application of these factors led to the conclusion that Garceau's other crimes jury instruction violated due process. First, the state's case, absent the impermissible propensity inference, was not a strong one. Second, the impermissible propensity inference was very strong. The other crime, Rambo's murder, was precisely the same crime for which Garceau was on trial. Third, the prosecutor relied fairly heavily on the Rambo murder in urging the jury to draw the propensity inference. Fourth, the other crime was explained in graphic detail and likely emotionally affected the jury.

[4] Drawing propensity inferences from other acts evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence. When no other inference is possible, such evidence must be excluded. The harm of drawing the propensity inference is no less stark when it is possible for the jury additionally to draw other inferences. The only way to mitigate this harm, short of excluding the evidence altogether, is to give the jury a limiting instruction. Even worse than failing to give such an instruction is what Garceau's trial court did: affirmatively inviting the jury to draw the propensity inference. Accordingly, it had to be concluded that the other crimes jury instruction rendered Garceau's trial so fundamentally unfair as to constitute a violation of the Due Process Clause.

[5] In order to determine whether the jury instruction constituted harmless error, the quality, significance, and pervasiveness of the evidence related to the propensity instruction had to be examined. **[6]** A review of the record led to the conclusion that the instruction did not constitute harmless error. It was highly probable that the court's instruction to the jury to consider Garceau's other crimes to judge his conduct had a substantial and injurious effect on determining the jury's verdict. **[7]** The district court erred in denying Garceau's habeas petition' its judgment had to be reversed and the case remanded with directions to issue the writ, unless the state would grant Garceau a new trial within a reasonable period of time to be set by the district court.

Judge Thomas concurred, writing separately to note that if the court were not reversing on the grounds stated in the majority opinion, it would necessarily have to reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase.

Judge O'Scannlain concurred in part and dissented in part, writing that the ineffective assistance claim warranted reversal, but, even if the jury instruction violated Garceau's due process rights, any error was harmless.

COUNSEL

Lynne S. Coffin, San Francisco, California, and Denise Kendall, Mill Valley, California, for the petitioner-appellant.

Clayton S. Tanaka, Deputy Attorney General of California, Sacramento, California, for the respondent-appellee.

OPINION

TASHIMA, Circuit Judge:

Robert Garceau was convicted of a double homicide in California state court and sentenced to death. The California Supreme Court affirmed his conviction and sentence, *People v. Garceau*, 862 P.2d 664

(Cal. 1993), cert. denied, 513 U.S. 848 (1994), and denied his state habeas petition on the merits. He then filed a habeas petition in federal district court, raising 28 separate grounds for relief. In due course, he moved the district court for an evidentiary hearing on several of these claims. The district court denied his motion for an evidentiary hearing and later denied his petition. Garceau appeals the district court's denial of an evidentiary hearing on four of his claims, as well as the district court's denial of his petition on three of his claims. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 2253, and we reverse.

I. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

Robert Garceau was convicted in Kern County, California, of first degree murder for the September 1984 stabbing deaths of his girlfriend, Maureen Bautista, and her 14-year-old son, Telesforo Bautista. Their bodies were not found until six months later, in a bedroom dresser buried under a layer of concrete in the backyard of one of Garceau's drug partners, Greg Rambo. There was no physical evidence linking Garceau to the murders. The State's case against him consisted largely of the testimony of several persons with whom Garceau manufactured methamphetamine. These drug partners testified that Garceau had confessed to them that he had killed the Bautistas because he was worried that they would reveal his drug activities to law enforcement authorities. They further testified that after Garceau murdered the Bautistas, he returned to the scene of the crime with two of his drug partners and stuffed the Bautistas' bodies into a bedroom dresser. Garceau and Greg Rambo then transported the dresser to Rambo's house. They buried the dresser under a layer of concrete in Rambo's backyard.

A few months later, in February 1985, Greg Rambo was shot to death. Prior to his trial for the Bautista murders, Garceau was charged with and convicted of Greg Rambo's murder and sentenced to 33 years to life imprisonment. At Garceau's trial for the Bautista murders, several of his drug partners testified that he had told them that he had killed Rambo as well. After Rambo's death, his wife, Susan, led the police to the bodies of the Bautistas buried in her backyard.

Virtually every single one of the prosecution's witnesses had some connection to the murder of the Bautistas or some other self-interested

reason for testifying against Garceau. Susan Rambo assisted in digging the hole in her backyard in which the dresser containing the Bautistas was buried for six months. She testified under a grant of immunity. Larry Tom Whittington helped stuff the Bautistas' bodies into the dresser at the crime scene. Patricia Shepard was Whittington's girlfriend; she and Whittington cleaned up the bloodstains at the crime scene the day after the bodies were removed. Harlyn Codd helped Garceau dispose of Rambo's body. The only witness that does not appear to have had a hand in any of the three murders was Wayne James. He was, however, involved in illegal drug manufacturing with Garceau, and he did not come forward to the police until a few days before he testified. Garceau argues that weapons charges against James were dropped after he agreed to testify. Garceau's defense at trial was that one or more of these drug partners killed the Bautistas.

At the sentencing phase, the prosecution presented evidence of Garceau's prior convictions for burglary and weapons charges. In addition, the jury heard evidence that Garceau possessed high-powered firearms on many other occasions, and that he was involved in a kidnaping. In mitigation, Garceau presented evidence of his history in prison, his upbringing, his character, and his caring relationships with people. The jury fixed the penalty at death.

Garceau appealed his conviction and sentence to the California Supreme Court, which affirmed the conviction and sentence. It also denied his state habeas petition on the merits. Garceau requested the appointment of counsel to pursue his federal habeas remedies and a stay of execution in federal district court on May 12, 1995. Counsel was appointed on June 26, 1995, and Garceau filed his federal habeas petition on July 2, 1996.[1/]

---

1. Although Garceau's petition for the writ of habeas corpus was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the AEDPA does not generally apply to his petition. This is the case because the AEDPA does not apply to petitions that were "pending" as of the effective date of the AEDPA, *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 539 (9th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999), and Garceau's petition is considered "pending" as of May 12, 1995, the date he requested both that federal habeas counsel be appointed and that his execution be stayed, *id.* at 540.

The district court eventually dismissed two of Garceau's 28 habeas claims for failure to exhaust them in state court proceedings. Garceau next filed a motion for an evidentiary hearing on several of his claims, which was denied. Ultimately, the district court denied his habeas petition, as well as the issuance of a certificate of probable cause. Garceau filed a notice of appeal from the final judgment on August 26, 1999, and we issued a certificate of probable cause on January 21, 2000.[2/]

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2. The provisions of the AEDPA regarding the issuance of a certificate of appealability (COA) as a predicate to review in the court of appeals apply to all cases in which the notice of appeal was filed after the AEDPA's effective date, April 24, 1996. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000). Garceau filed his notice of appeal after that date. In these circumstances, we treat Garceau's notice of appeal as an application for a COA. *See Whelchel v. Washington*, 232 F.3d 1197, 1202 n.1 (9th Cir. 2000). Under the AEDPA, a court may issue a COA when"the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks omitted) (emendation in the original)). Because it is clear that Garceau meets this standard, we grant the COA and exercise jurisdiction over all issues presented in

II. DISCUSSION

Garceau contends that the district court erred by: (1) denying his request for an evidentiary hearing on his ineffective assistance of counsel and equal protection claims; (2) dismissing his claim that the State used its peremptory challenges in a racially discriminatory manner; (3) dismissing his claim that the "other crimes" jury instruction violated the Due Process Clause; and (4) dismissing his claim that the trial court's failure to give the jury a "voluntary intoxication " instruction violated the Due Process Clause. Because we conclude that habeas relief is warranted based on the "other crimes" jury instruction, we find it unnecessary to address the remaining issues.

A. Standard of Review

We review de novo the district court's decision to deny a petition for a writ of habeas corpus. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir. 2000).

B. The "Other Crimes" Jury Instruction

During Garceau's trial, the State introduced two types of evidence of other crimes committed by Garceau: evidence that he manufactured illegal drugs and testimonial evidence that, several months after he allegedly murdered the Bautistas, he murdered Greg Rambo (a crime for which he had already been convicted). Although Garceau did not object to this evidence (in fact, he had planned to introduce it himself), he did object to the trial court's instruction to the jury regarding this evidence, which read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed other crimes other than that for which he is on trial.

---

this appeal. *See Whelchel*, 232 F.3d at 1202 n.1.

> Such evidence, if believed, may be considered by you for any purpose, including but not limited to any of the following:
>
> *His character or any trait of his character; His conduct on a specific occasion . . . .*

Garceau, 862 P.2d at 690 n.17 (emphasis added). Garceau asked instead for a modified version of the standard California (CALJIC) instruction on other crimes evidence, which would have instructed the jury that such evidence"may not be considered by you to prove . . . bad character or . . . disposition to commit crimes." *Id.* at 690 n.18. His request was rejected by the court.

On direct appeal, Garceau argued that the trial court's instruction violated California Evidence Code § 1101, which reads:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, *evidence of a person's character or a trait of his or her character* (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) *is inadmissible when offered to prove his or her conduct on a specified occasion.*
>
> (b) *Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact* (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) *other than his or her disposition to commit such an act.*

Cal. Evid. Code § 1101(a), (b) (2001) (emphasis added). The California Supreme Court agreed, holding that the instruction "impermissibly invited the jury to consider certain evidence (e.g., that defendant killed Rambo) for the purpose of establishing defendant's propensity to commit murder. " *Garceau*, 862 P.2d at 691. The

California Supreme Court concluded, however, that the error was harmless because there was "overwhelming evidence" of Garceau's guilt. *Id.* at 691-92.

Garceau argues that, not only was the instruction contrary to California law, but it violated the Due Process Clause by permitting the jury to use the evidence of his other crimes to establish his criminal propensity, i.e., the likelihood that he committed the charged crimes.

[1] The Supreme Court has held that it is not a violation of due process to admit other crimes evidence, for purposes other than to show conduct in conformity therewith, where the jury is given a limiting instruction "that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried." *Spencer v. Texas*, 385 U.S. 554, 558, 563-64 (1967); *accord Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991). The defendant in Spencer was charged with murder and the trial court admitted into evidence the fact that the defendant had previously been convicted of murder. *Spencer*, 385 U.S. at 557. Although the Supreme Court did not explicitly say that the limiting instruction was necessary to the constitutional admission of the other crimes evidence, it relied on the existence of the limiting instruction in holding that there was no due process violation. *Id.* at 562. ("This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that . . . the jury is expected to follow instructions in limiting this evidence to its proper function . . . .").

This reliance has led two circuits to hold that the admission of other crimes evidence, for purposes other than to show conduct in conformity therewith, violates due process in the absence of a limiting instruction. *See Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. 1981) (holding that it violated due process for the jury to hear "repeated references to the defendant's criminal past without any limiting instruction to relate this evidence only to the firearm violation and to disregard it altogether in considering the murder count"); *Murray v. Superintendent, Ky. State Penitentiary*, 651 F.2d 451, 453 (6th Cir. 1981) (noting that the Sixth Circuit has held that "[t]he logical converse of [Spencer] is that it is unfair and violative of due process if evidence of other crimes is admitted without a limiting instruction").

Nonetheless, the Supreme Court has never expressly held that it

violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions, *see Estelle*, 502 U.S. at 75 n.5 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of `prior crimes' evidence to show propensity to commit a charged crime.").[3]

The Ninth Circuit has addressed the first of the issues left open by the Supreme Court by holding that the admission of other crimes evidence, where there were no permissible inferences the jury could have drawn from the evidence (in other words, no inference other than conduct in conformity therewith), violates due process. *See McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993); *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). In *Jammal* and *McKinney*, however, we did not have before us a case, like this one, where there is a permissible inference that the jury could draw from the other crimes evidence, but where the jury was expressly invited to draw the additional inference of criminal propensity.[4]

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3. In his partial dissent in Spencer, Chief Justice Warren argued that "[w]hile this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions . . . suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." 385 U.S. at 572-74. This comports with the Advisory Committee's analysis of Fed. R. Evid. 404, that the general rule against using other crimes evidence to make inferences about character or propensity in a criminal case "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions." Fed. R. Evid. 404(a) advisory committee note (1972).

4. In Jammal, there was no limiting instruction, but the

[2] The question we must answer, therefore, is whether the express propensity instruction in this case "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (internal quotation marks and citations omitted). The analysis underlying *McKinney* supports the conclusion that the jury instruction at issue so offended fundamental conceptions of justice and fair play as to rise to the level of a constitutional violation. Specifically, in McKinney, we held that the admission of other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was "solely circumstantial;" (2) the other crimes evidence, which involved the defendant's past use of knives, was similar to the stabbing for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was "emotionally charged." *McKinney*, 993 F.2d at 1381-82, 1385-86.

[3]Application of the *McKinney* factors to this case similarly leads to the conclusion that the other crimes jury instruction violated due process. First, the State's case, absent the impermissible propensity inference, was not a strong one. There was no physical evidence connecting Garceau to the alleged murders. The State's case consisted entirely of testimony by Garceau's drug partners that Garceau had told them that he had committed the murders and circumstantial evidence. Garceau argued to the jury, not implausibly, that this testimony was tainted by self-interest. Second, the impermissible propensity inference in this case was very strong. The other crime, Rambo's murder, was precisely the same crime for which Garceau was on trial. In addition, the proximity between Rambo's murder and the murders for which Garceau was on trial was a very close five months. Third, the prosecutor relied fairly heavily on the Rambo murder in urging the jury to draw the propensity inference.[5] Fourth, the other crime in this case was explained

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defendant was "barred from complaining" about its absence because he did not request one. 926 F.2d at 920 n.2. Garceau asked for a limiting instruction.

5. The prosecutor referred to Rambo's murder on dozens of pages of the transcript of his closing argument. He began his closing argument by saying that he intended to show that "the defendant [was] the killer of not only Maureen Bautista and Telesforo Bautista but Greg Rambo." State Ct. Rep. Tr. at 3658. He tied the murders together at several points in his closing argument, perhaps most extensively by using several pages of transcript to make a point-by-point comparison of the three murders, arguing that "[t]here are certain systems at least of categories that connect Maureen and Telesforo's murder with Greg Rambo's murder." State Ct. Rep. Tr. at 3861-65. He concluded: "Garceau is the common denominator. Garceau is the [illegible]ho committed the murders." State Ct. Rep. Tr. at 3865.

in graphic detail and very likely emotionally affected the jury.

[4] Moreover, *McKinney* based its conclusion regarding the Due Process Clause on the fact that "drawing propensity inferences from `other acts' evidence of character is impermissible under an historically grounded rule of Anglo-American jurisprudence . . . ." *Id.* at 1384. The court held that when no other inference is possible, such evidence must be excluded. *Id.* The harm of "drawing the propensity inference" is no less stark, however, where it is possible for the jury additionally to draw other inferences. The only way to mitigate this harm, short of excluding the evidence altogether (which *Spencer* and *Estelle* held is not required by due process) is to give the jury a limiting instruction. Even worse than failing to give such an instruction is what the trial court did in this case: affirmatively inviting the jury to draw the propensity inference. Accordingly, we conclude that the other crimes jury instruction rendered Garceau's trial so fundamentally unfair as to constitute a violation of the Due Process Clause.

We must next determine whether the due process violation constituted harmless error. The California Supreme Court held the erroneous jury instruction in this case was harmless under the "harmless beyond a reasonable doubt " standard of *Chapman v. California*, 386 U.S. 18 (1967). *Garceau*, 862 P.2d at 691-92. Although that is the correct standard for direct review, habeas review is more deferential. *See*

Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) ("The imbalance of the costs and benefits of applying the Chapman harmless error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error."). On habeas review, error is harmless unless it " `had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). That is, the error is harmless unless Garceau can establish "actual prejudice." *Brecht*, 507 U.S. at 637 (internal quotation marks and citation omitted).

The district court accorded the California Supreme Court's conclusion that the error in this case was harmless beyond a reasonable doubt a "presumption of correctness " because it was a "state court finding[ ]." As Garceau correctly points out, however, "[w]hether the constitutional error was harmless is not a factual determination entitled to the statutory presumption of correctness under 28 U.S.C. § 2254(d)." *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). Thus, we consider the harmless error question de novo.

[5] The court in *McKinney* stated that "[t]he analysis that leads us to conclude that the erroneous admission of propensity evidence rendered [defendant's] trial fundamentally unfair in violation of the Due Process Clause is similar to the analysis we must undertake to determine whether his conviction must be set aside on collateral review." *McKinney*, 993 F.2d at 1385. The court proceeded to conduct the harmless error analysis by evaluating the same factors it had used to determine that a constitutional violation had occurred. Id. at 1386. Following *McKinney*, in order to determine whether the jury instruction in this case constituted harmless error, we therefore examine the quality, significance, and pervasiveness of the evidence related to the propensity instruction.

[6] As discussed above, a review of the record leads to the conclusion that the instruction did not constitute harmless error. The evidence against Garceau was not weighty; in fact, there was no direct physical evidence implicating Garceau and the conviction turned on the testimony of potentially biased witnesses. In addition, the other crimes evidence was used pervasively throughout the trial. Indeed, the prosecutor made significant reference to the Rambo murder during closing argument. Moreover, one of the other crimes in

question--Rambo's murder--was identical to the crime for which Garceau was on trial, heightening its emotional impact and evidentiary significance.[6] In light of these facts, it was highly probable that the court's instruction to the jury to consider Garceau's other crimes to judge his conduct had a substantial and injurious effect on determining the jury's verdict. *See id.*

The State argues, and the California Supreme Court concluded, that the balance of the State's case against Garceau was "overwhelming." This argument is based largely on the fact that several people testified in detail that Garceau confessed to them that he had committed the murders. It is true that evidence of a confession carries significant weight on harmless error review, at least when the defendant has confessed to the police. *See, e.g., Tucker v. Johnson*, 242 F.3d 617, 629 (5th Cir.) (holding that admission of other crimes evidence was harmless in light of defendant's confession to police and overwhelming evidence of guilt), cert. denied, 112 S. Ct. 18 (2001). The confessions introduced in this case, however, were not made to the police, but assertedly to drug partners who arguably had reasons to lie. This weakens considerably the evidentiary weight of the confessions and, as a result, significantly undermines the State's assertion that the weight of the evidence of guilt was overwhelming. When viewed in the context of the entirely circumstantial and self-interested nature of the evidence against Garceau, the fact that the jury was instructed to infer criminal propensity from the other crimes testimony clearly prejudiced Garceau's case. We conclude, therefore, that the admittedly unconstitutional jury instruction was not harmless and that the writ of habeas corpus should issue.

III. CONCLUSION

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6. Nor was the other crimes evidence in this case "cumulative" of properly admitted evidence. *See Brecht v. Abrahamson* , 507 U.S. 619, 639 (1993); see also *Laboa v. Calderon*, 224 F.3d 972, 978 (9th Cir. 2000) (holding improperly admitted confession was harmless because it "added nothing to the evidence").

[7] For the foregoing reasons, we conclude that the district court erred in denying Garceau's habeas petition on the ground that the "other crimes" jury instruction, albeit erroneous, was harmless error. Because Garceau's trial and conviction were infected with constitutional error which had a substantial and harmful effect on the jury's verdict, we reverse the judgment of the district court denying Garceau's petition for a writ of habeas corpus. We remand the case to the district court with directions to issue the writ, unless the State grants Garceau a new trial within a reasonable period of time to be set by the district court.

REVERSED and REMANDED.

THOMAS, Circuit Judge, concurring:

I concur in Judge Tashima's opinion. I write separately to note that, if we were not reversing on the grounds stated in the majority opinion, we would necessarily have to reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase. Indeed, the warden conceded as much during oral argument of this case.

We review the district court's decision to deny an evidentiary hearing for an abuse of discretion. *Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). In this case, the district court erred in denying Garceau's request for an evidentiary hearing concerning his claim of ineffective assistance of counsel at the penalty phase.

"To obtain an evidentiary hearing on an ineffective assistance of counsel claim, a habeas petitioner must establish that (1) his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). "In addition, . . . if the petitioner has failed to develop material facts in state court proceedings, he or she must demonstrate [1] adequate cause for his or her failure and [2] actual prejudice resulting from that failure." *Id.*

Garceau did not develop the facts supporting his ineffective assistance of counsel claims in state court. However, he has shown both

cause and prejudice justifying his failure.

A proper request for an evidentiary hearing in state court satisfies the "cause" requirement.

> When a state court denies an evidentiary hearing on a colorable ineffective assistance of counsel claim after proper request, a habeas petitioner has fulfilled the [*Keeney v.*]*Tamayo-Reyes*[, 504 U.S. 1 (1992),] "cause" requirement. Simply put, the state cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding.

Correll, 137 F.3d at 1413. Therefore, Garceau has satisfied the "cause" requirement by requesting a state evidentiary hearing on these issues. *See id.*

Because the *Tamayo-Reyes* prejudice prong is coextensive with the ineffective assistance of counsel prejudice prong under *Strickland v. Washington*, 466 U.S. 668 (1984), Garceau will have satisfied the prejudice prong under *Tamayo-Reyes* if he establishes a colorable ineffective assistance of counsel claim. *See Correll*, 137 F.3d at 1414.

The parties do not dispute that Garceau did not receive a state evidentiary hearing on these issues; therefore, a state court has not "reliably found the relevant facts, " *see id.* at 1411, and he will be entitled to an evidentiary hearing if he establishes a colorable claim.

"To establish a colorable claim of ineffective assistance of counsel, [petitioner] must demonstrate [1] that his counsel's performance at trial was deficient, and [2] that the deficient performance prejudiced his defense." *Id.* (*citing Strickland*, 466 U.S. at 687).

In this case, Garceau's counsel performed deficiently in preparing for and conducting Garceau's sentencing hearing. Counsel failed to investigate mitigating evidence relating to drug addiction and post-traumatic stress disorder ("PTSD"). Counsel also failed to investigate and rebut aggravating evidence regarding Garceau's participation in an alleged kidnapping.

"[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as

a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." *Hendricks v. Calderon* , 70 F.3d 1032, 1043 (9th Cir. 1995).

Counsel testified that he knew of Garceau's cocaine use and that he "was aware that cocaine use caused significant alternations in mental functioning and behavior, including that cocaine was widely recognized to cause psychosis as a result of chronic use." Nonetheless, he did not investigate the extent of Garceau's use, nor did he question the witnesses about Garceau's use or behavioral changes although even the prosecution's witnesses described Garceau's paranoid and delusional behavior. Furthermore, he hired an expert who could not document or diagnose the impact of chronic cocaine dependence and was not a psychopharmacologist. No strategic reason supported counsel's failure to investigate Garceau's drug addiction. *See id.*

Similarly, counsel failed to investigate or present evidence of PTSD. Although counsel stated that he was not aware that Garceau suffered from PTSD, he did know that Garceau served in Vietnam and abused heavy amounts of cocaine. Dr. Craig W. Haney, a psychology professor and an attorney, declared that at the time of the arrest and trial"it was common knowledge among virtually all mental health professionals and most capital attorneys with whom [he] was familiar that such experiences [as combat service in Vietnam] could produce long lasting psychological problems of the sort [Garceau] was experiencing and, also, that many persons suffering from these psychological problems used alcohol and illicit drugs in an effort to 'self-medicate' and blunt the pain and mask the emotional and behavioral consequences of the post-traumatic stress they were experiencing." Given the combat service, the drug use, the violence of the attacks, and the statements by his drug partners about paranoia and delusional behavior, counsel should have known to investigate PTSD as a possible mitigating factor. The failure to do so falls "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

The decision to not present mitigating evidence at a capital sentencing hearing "should be the product of a reasoned choice. Counsel has 'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *Correll*, 137

F.3d at 1412 (*quoting Strickland*, 466 U.S. at 691). In this case, counsel did not make a reasoned choice; he simply failed to investigate potentially mitigating evidence. *See id.*

Additionally, counsel performed "outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, in utterly failing to investigate and rebut the aggravating evidence of Garceau's involvement in an alleged kidnapping. The prosecution presented considerable evidence during the sentencing hearing about this event. Garceau was initially charged as the driver in a kidnapping; however, the charges were dropped after the defense eattorney produced a witness who claimed that the alleged victim got into the truck voluntarily. Counsel in this case did not contact the prior attorney, did not interview any of the prosecution's witnesses, and did not attempt to find other percipient witnesses. In fact, one of the witnesses, the co-defendant in the kidnapping, even contacted counsel, but counsel refused to speak with him and just told him to arrive when he had been subpoenaed. During the sentencing hearing, counsel did not even bother to present evidence that the charges had been dismissed. Counsel's utter failure to investigate this aggravating evidence constitutes constitutionally deficient performance. *See Correll*, 137 F.3d at 1412-13.

Counsel's deficient performance also prejudiced Garceau. "To establish the prejudice prong of the *Strickland* standard, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Hendricks*, 70 F.3d at 1036 (alteration in original) (*quoting Strickland*, 466 U.S. at 694). Failing to reasonably investigate potentially mitigating circumstances without a reasonable tactical explanation constitutes prejudice. *Correll*, 137 F.3d at 1413 ("[A]bsent any reasonable investigation into potentially mitigating circumstances and any reasonable tactical explanation, we must conclude [petitioner] has made a colorable claim of ineffective assistance of counsel at his capital sentencing.").

Counsel put on no expert testimony at all during the penalty phase.[1/]

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1. In fact, counsel relied exclusively on the testimony of

The jury learned of Garceau's drug use through the prosecution witnesses, but counsel failed to put Garceau's drug use, social history, and Vietnam experience before the jury in a way that could explain his addiction and his behavior. In failing to do so, his performance prejudiced Garceau. *See Caro v. Calderon*, 165 F.3d 1223, 1227-28 (9th Cir. 1999); *see also Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) ("Does an attorney have a professional responsibility to investigate and bring to the attention of mental heath experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes."), cert. denied, 528 U.S. 1105 (2000).

Furthermore, the prosecution focused intently on the alleged kidnapping during the sentencing hearing. In closing, the prosecutor argued a trend of escalating violence that culminated in the three murders: "consider . . . whether this defendant is a man who has committed isolated acts of criminal conduct or whether this offender has rather developed a pattern of criminal conduct that began with the burglary and ultimately exploded into what I'm about to tell you is three murders." State Ct. Rep. Tr. of Sentencing Hr'g at 172. The kidnapping was an essential "first outward manifestation of violence toward another person" in this argument. State Ct. Rep. Tr. of Sentencing Hr'g at 173. Because of the kidnapping's pivotal role in the prosecution's argument, counsel's utter failure to investigate and rebut the prosecution's characterization of the incident as a crime of violence, at least by mentioning that the charges had been dismissed because a witness claimed that the alleged victim voluntarily accompanied the defendants, is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Garceau has established a colorable claim of ineffective assistance of counsel during his sentencing hearing. He has also demonstrated cause and prejudice, see Tamayo-Reyes, 504 U.S. at 6, for his failure to develop related facts in state court. Therefore, the district court erred in

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two family members and the cross-examination of the prosecution's witnesses--most of whom testified about the alleged kidnapping.

denying his request for an evidentiary hearing on these issues. *See Correll*, 137 F.3d at 1412.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Thomas that we must "reverse and remand with instructions to the district court to hold an evidentiary hearing on Garceau's claim of ineffective assistance of counsel during the sentencing phase"; indeed, even "the warden conceded as much during oral argument of this case." *Supra*, Concurrence at 17261 (Thomas, J., concurring). But the majority goes further, reversing and remanding with instructions to grant Garceau a writ of habeas corpus (unless California grants him a new trial) based on the"other crimes" jury instruction. Because I believe that even if the instruction might have violated Garceau's due process rights any error was harmless under the deferential standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), I respectfully dissent.

I

The majority forthrightly admits that "the Supreme Court has never expressly held that . . . it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes." *Supra*, Maj. Op. at 17256. Nonetheless, the majority extends this court's precedents to hold that the "other crimes" instruction given in this case, which explicitly allowed the jury to use evidence of Garceau's other crimes as propensity evidence, "so offended fundamental conceptions of justice and fair play as to rise to the level of a constitutional violation," *id.* at 17257.[1]

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1. Of course, it is not clear that the majority could have reached this conclusion had it been forced to grapple with *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). The Supreme Court has explained that in the usual federal habeas case, "[t]he application of *Teague* is a threshold question . . . ."

Goeke v. Branch, 514 U.S. 115, 117 (1995) (per curiam). *Teague*, of course, bars a federal court considering a pre-AEDPA habeas petition from granting the petition where the vindicating a petitioner's claim would create a "new rule." *Id.* at 310. Certainly, given that neither the Supreme Court nor this court has yet addressed the question that today's opinion answers, the state has at the very least a colorable argument that the majority today announces a "new rule," on which it cannot grant Garceau relief. *See O'Dell v. Netherland* , 521 U.S. 151, 164 (1997) (stating that a new rule is one that "a reasonable jurist . . . would not have felt compelled to adopt") (emphasis added). Alas, the state did not raise *Teague* in its briefs before this court. And I recognize that we have discretion to consider *Teague* waived if it is not raised in the briefing. *See, e.g., United States v. Navarro*, 160 F.3d 1254, 1256 (9th Cir. 1998) ("*Teague* can be waived . . . .") (*citing Goeke*, 514 U.S. at 116-18). But given the majority's candid admission that the new rule it announces today is not compelled by any of our precedents, I would hesitate to forego a *Teague* analysis if the state had only implicitly waived *Teague* by failing to raise it in his briefs. *See, e.g., Jackson v. Johnson*, 217 F.3d 360, 361 (5th Cir. 2000) ("[A]bsent compelling reasons to the contrary, a federal court should apply *Teague* even when it has been implicitly waived by the State."). The state, though, went one step further. Asked at oral argument whether *Teague* applied to this case, counsel for the state lamely replied, "*Teague* has never been raised in this case." When pressed from the bench, and given an opportunity to raise *Teague* , counsel impotently responded, "I don't know why *Teague* has never been raised in this case," but did not, in fact, raise it. Because the state thus explicitly declined to invoke *Teague*, even when squarely presented with the opportunity to do so, I reluctantly conclude that it is inappropriate to analyze whether the *Teague* bar applies. I note with dismay, however, that the state has no one to blame but its own lawyer for the fact that the majority can

The majority may be right on this point. Certainly,"[t]he Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and widespread such practices may be." *United States v. Lemay*, 260 F.3d 1018, 1024 (9th Cir. 2001). And indeed, the Supreme Court has warned against the wholesale importation of common law and evidentiary eerules into the Due Process Clause of the Constitution. Thus, in *Dowling v. United States*, the Court explained that a rule or practice must be a matter of "fundamental fairness" before it may be said to be of constitutional magnitude. 493 U.S. 342, 352 (1990); *see also id.* ("[B]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."). But as we have pointed out before, the Supreme Court has further explained that"the primary guide for determining whether a rule is so`fundamental' as to be embodied in the Constitution is historical practice." *Lemay*, 260 F.3d at 1025 (citing *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion)). And as we have recognized,"it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status." *Id.* (*citing Old Chief v. United States*, 519 U.S. 172 (1997); *Michelson v. United States* , 335 U.S. 469 (1948); and *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993)); *see also, e.g., Harrison's Trial* , 12 How. St. Tr. 834, 864 (Old Bailey 1692) (Holt, C.J.) (excluding propensity evidence in a murder trial, remarking, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter"); *Hampden's Trial*, 9 Cob. St. Tr. 1053, 1103 (K.B. 1684) (Withins, J.) (excluding evidence of prior forgeries from the trial of a man accused of forgery, explaining that the evidence would "rak[e] into men's course of life, to pick up evidence that they cannot be prepared to answer to"). *See generally* Louis M. Natali, Jr. & R. Stephen Stigall, "*Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOYOLA U. CHI. L.J. 1, 12-23 (1996).

Accordingly, it may be true that the jury instruction in this case, which explicitly invited the jury to consider past crimes committed by Garceau as evidence of his guilt in this case, violated Garceau's due

apply its newly-minted rule in this case.

process rights. Presuming, as we must, that the jury in this case followed its instructions, *see, e.g., Weeks v. Angelone*, 528 U.S. 225, 234 (2000), we must conclude that the jury considered Garceau's prior crimes as evidence that he committed the crime for which he was being tried. Because such consideration puts a thumb on the prosecution's side of the scales of justice and may well allow conviction on evidence that does not demonstrate guilt for this crime beyond a reasonable doubt, it seems fair to reason, as the majority does, that it violates the Due Process Clause. *Cf. People v. Garceau*, 862 P.2d 664, 691 (Cal. 1993) (in bank) (noting that when "other crimes" evidence is considered to show propensity, it "invites the jury to be swayed by speculation that, because the defendant previously has murdered, he or she also committed the charged murder").

II

Even assuming that Garceau suffered a violation of his constitutional rights, though, I simply cannot conclude that Garceau is entitled to federal habeas relief. For even if the "prior crimes" instruction violated Garceau's due process rights, on habeas review we may grant relief only if the alleged error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. That is, Garceau is entitled to habeas relief only if he can show that any constitutional violation "resulted in `actual prejudice.' " *Id.*

I begin by noting that, for purposes of this analysis, the introduction of evidence of Garceau's prior crimes was not itself problematic. As the majority correctly points out, there was a permissible, non-propensity inference that the jury could have drawn from this evidence. *See supra* , Maj. Op. at 17256 (admitting that in this case, "there is a permissible inference that the jury could draw from the other crimes evidence"). Indeed, as the California Supreme Court explained, the other-crimes evidence

> was *not* introduced over the objection of the defense, but rather *at its invitation*. The defense sought to include such evidence in an effort to persuade the jury of the likelihood that some other member of the drug conspiracy killed Greg Rambo and the Bautistas.

Garceau, 862 P.2d at 691. Thus, the only question to be answered is whether the giving of the "other crimes" instruction itself, which specifically invited the jury to draw the propensity inference, resulted in "actual prejudice " to Garceau under the highly deferential standard of *Brecht* . In my view, the answer to that question is emphatically "no."

The majority analyzes the factors outlined in *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993) and concludes that any constitutional error committed by the trial court when it gave the "other crimes" instruction was not harmless under *Brecht*. This analysis, though, ignores one unassailable truth about the facts of this case: the jury heard evidence that Garceau had killed Rambo only from the same drug partners who testified that he killed the Bautistas. The state did not introduce evidence of Garceau's conviction for Rambo's murder. As a result, the State's entire case rested on the credibility of Garceau's drug partners. *Cf. Garceau*, 862 P.2d at 691 (explaining that "it was clear the defense desired that the jury consider th[e] ["other crimes"] evidence for the purpose of establishing defendant's innocence of the charged offenses"). That the jury convicted Garceau therefore strongly suggests that the jury found the State's witnesses credible, and thus, only factors that eroded the credibility of the drug partners would have changed the outcome. I cannot believe that the jury would have believed Garceau's drug partners when they said that Garceau committed the other crimes, but then doubted them when they said that he committed the Bautista murders, only to have that doubt mollified by the propensity instruction. The jury either believed the testimony of the drug partners, or it did not. Because this credibility determination would not have been undermined by removing the propensity inference from the jury's deliberations, I simply cannot comprehend how a proper jury instruction would have changed the outcome. *Cf. Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997) (holding error not harmless where it undermined the credibility of key witnesses).

While the majority may be correct in asserting that the evidence of Garceau's guilt was not, as the state contends, "overwhelming," that is not to say that the propensity inference was the key to the State's case on the question of Garceau's guilt. Indeed, as I have already explained, the key to the state's case was the credibility of Garceau's drug partners--and the inference in no way affected that credibility. Accordingly, I am not

persuaded that the instruction was harmful under *Brecht*. *Cf. Penry v. Johnson*, 121 S. Ct. 1910, 1920 (2001) (concluding that any error in admitting evidence did not have a"substantial and injurious effect" on the verdict under *Brecht* where the evidence admitted "was by no means the key to the State's case").

III

No one seriously disputes that the jury instruction given in this case violated California evidentiary law. But that alone is not enough to merit federal habeas relief. As we have explained before,

> We are not a state supreme court of errors; we do not review questions of state evidence law. On federal habeas we may only consider whether the petitioner's conviction violated *constitutional* norms. . . .
>
> [F]ailure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief. While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated. . . .

Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (emphasis added). In this case, the propensity instruction may well have violated Garceau's due process rights. But even that is not enough. As a federal habeas petitioner, Garceau must also show actual prejudice. This he has not done; thus, he is not entitled to habeas relief from this court. Because the majority today grants a new trial (or, alternatively, freedom) to a man who (i) was duly convicted under California law of brutally killing two innocent women, and (ii) is not being held in violation of the Constitution of the United States, I dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT FREDERICK GARCEAU,

Petitioner-Appellant,

v.

JEANNE WOODFORD, Acting Warden of San Quentin State Prison,

Respondent-Appellee.

No. 99-99022

D.C. No. CV F-95-5363 OWW

ORDER DENYING REHEARING

Filed February 15, 2002

Before: Diarmuid F. O'Scannlain, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

ORDER

Despite the fact that it "explicitly declined to invoke *Teague*," either in the trial court or in this court, *Garceau v. Woodford*, 275 F.3d 769, 781 n. 1 (9th Cir. 2001) (O'Scannlain, J., dissenting), the State, in its petition for rehearing, asks us to invoke the rule of *Teague v. Lane*, 489 U.S. 288, 310 (1989), that a "new rule" of constitutional law cannot be applied retroactively to cases on collateral review, and to deny relief to petitioner on that ground. We decline the invitation under the law of our circuit. *See Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir. 1992) ("We deny the petition for rehearing because the state has waived the *Teague* defense in this case."). Although we there noted that "[t]he Supreme Court has not yet decided whether a state may waive the *Teague* defense by failing timely to raise it," *id.*, the Court has since

declined to dispose of a case on the ground that a "new rule" was involved "because petitioner [State warden] did not raise a *Teague* defense in the lower courts or in his petitioner for certiorari." *Godinez v. Moran*, 509 U.S. 389, 397 n. 8 (1993) (citations omitted). Accordingly, even though we have the discretion to consider a *Teague* claim raised for the first time on a petition for rehearing, *See Boardman*, 957 F.2d at 1536-37, we decline to do so here where the State's lawyer declined to raise *Teague*, even after the panel inquired of him directly at oral argument whether the State wished to do so. *See Garceau v. Woodford*, 275 F.3d at 781 n. 1 (explaining that under the circumstances, "I reluctantly conclude that it is inappropriate to analyze whether the *Teague*" bar applies) (O'Scannlain, J., dissenting).

Judges Tashima and Thomas vote to deny the petition for panel rehearing and Judge O'Scannlain votes to grant it. The panel votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED
FEB 25 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT FREDERICK GARCEAU,

Petitioner-Appellant,

v.

JEANNE WOODFORD, Acting Warden of San Quentin State Prison,

Respondent-Appellee.

No. 99-99022

D.C. No. CV F-95-5363 OWW

ORDER

Before: TASHIMA, Circuit Judge:

Pursuant to the motion of respondent-appellee, issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the Supreme Court. The stay is granted prusuant to Fed. R. App. P. 41(d)(2), and is subject to the limitations of Fed. R. App. P. 41(d)(2)(B).

FILED
Jul 30 4 29 PM'99
Clerk, U.S. District Court
Eastern District of Calif
By_____
Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT FREDERICK GARCEAU,	Case No. CIV. F-95-5363- OWW-P
Petitioner,	Death Penalty Case
vs.	Memorandum and Order Denying Petition for Writ of Habeas Corpus and Denying Issuance of Certificate of Probable Cause
JEANNE S. WOODFORD, Acting Warden of San Quentin State Prison,	
Respondent.	

I. Introduction

Robert Garceau ("Garceau") petitions for a writ of habeas corpus, alleging his first degree murder convictions and death penalty violate the United States Constitution. Jeanne Woodford ("the State") responds that no error occurred at Garceau's trial which substantially influenced the jury's verdict or would otherwise justify relief. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

II. Procedural History

Garceau was convicted in Kern County of first degree murder for the September 1984 stabbing deaths of Maureen ("Maureen") and Telesforo ("Telesforo") Bautista. The special circumstance of multiple

murder was found true. CT-6:1386-90 (Guilt and Special Circumstance Verdicts).[1] The jury fixed the penalty at death. RT-XVI:10. Sentence was pronounced July 30, 1987. RT-1:246.

The California Supreme Court denied Garceau's habeas petition on the merits September 1, 1993; affirmed his conviction and sentence November 18, 1993, *People v. Garceau*, 6 Cal. 4th 140 (1993); and denied a petition for rehearing January 26, 1994. The United States Supreme Court denied certiorari October 3, 1994.

Garceau requested counsel and a stay of execution in this Court May 12, 1995. Counsel was appointed June 26, 1995. Garceau filed his federal petition July 2, 1996. A motion to dismiss Claims Z and AA for failure to exhaust and state a federal claim was granted September 23, 1997. Claims D and E were found unexhausted, but exhaustion was excused on futility grounds under California's timeliness rules.[2] Garceau's request for evidentiary hearing, and related claims A, B, D, H, S, X and Y, were denied on the merits March 30, 1999.[3]

III. Applicability of the AEDPA

Garceau's case is not subject to the amendments to Chapter 153,

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1. The state record on appeal is cited as follows: "CT" for Clerk's Transcript, volumes 1-6; and "RT" for Reporter's Transcript, Volumes I-XV (guilt phase), XVI (jury deliberations and verdicts at guilt and penalty phases), and 1 (penalty phase). A colon separates the volume and page numbers.

2. California's procedural rules regarding timeliness were inadequate to bar federal review at the time of Garceau's state appeal. *See Calderon v. U.S. Dist. Court (Bean)*, 96 F.3d 1126 (9th Cir. 1996); *Calderon v. U.S. Dist. Court (Hayes)*, 103 F.3d 72 (9th Cir. 1996).

3. The Statement of Facts and the analysis of Claims A, B, D, H, S, X, Y, Z, AA and parts (b) and (g) of Claim BB are set forth in prior orders of September 23, 1997 and March 30, 1999. They are repeated here for convenience.

Title 28 of the United States Code, promulgated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (amended Chapter 153 provisions apply only to cases filed after its effective date); *Calderon v. U.S. Dist. Court (Kelly V)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1377 (1999) (habeas corpus case is pending or filed when an application for a stay of execution and appointment of counsel is filed).[4]

IV. Facts

On September 6 or 7, 1984, Garceau fatally stabbed his girlfriend, Maureen Bautista, and her 14-year-old son, Telesforo, who witnessed his mother's killing, in a Bakersfield apartment. Garceau left the scene and several hours later two of his acquaintances, Greg Rambo ("Rambo") and Larry Tom Whittington ("Whittington"), went to the apartment to remove the bodies. They concealed the bodies inside a bedroom dresser. Garceau and Rambo returned the next day and transported the dresser with the bodies to Rambo's Shandon, San Luis Obispo County residence. The dresser was buried under a layer of concrete in Rambo's backyard. On February 19, 1985, Garceau shot and killed Rambo in a shed in Parkfield, in southwest Monterey County. Garceau and Harlyn Codd ("Codd") disposed of Rambo's body in a ravine, in remote Tulare County.[5]

No physical evidence directly linked Garceau to the Bautista

4. The State's motion to apply Chapter 154 of the AEDPA to Garceau's case was denied. *See* Order Regarding Respondent's Motion to Apply Chapter 154 to Pending Death Penalty Cases, filed December 21, 1998.

5. Prior to his Kern County trial, Garceau was convicted in Monterey County for the Rambo killing, and sentenced to 33 years to life. That conviction was affirmed June 3, 1987. *See People v. Garceau*, Case No. H001539 (6th Dist.Ct.App. 1987).

murders. Several of Garceau's acquaintances testified he confessed to committing the crimes before his arrest in March of 1985. The defense focused on attacking these witnesses' credibility, contending they had equal motives as Garceau to kill Maureen. Garceau presented no alibi evidence, nor did he testify.

The prosecution's case rested largely on Garceau's numerous confessions to various persons with whom he manufactured methamphetamine. The prosecution argued Garceau killed Maureen to prevent her from "snitching him off" about his drug activity, and killed her son, Telesforo, to eliminate the witness to his mother's murder. Numerous witnesses testified to Garceau's intense hatred of "snitches" and Garceau's frequent statement, both before and after the murders, "snitches die."

Susan Rambo ("Susan"), Greg's widow, testified under a grant of immunity. RT-X:2602. She described Garceau's confession about the murders of the Bautistas, and Garceau's methamphetamine manufacturing operation. Drug activity began in the summer of 1984 in a small trailer behind the Rambos' Shandon house.[6] RT-X:2571-72, RT-XI:2606-07. Whittington introduced Garceau to the Rambos. RT-X:2570, RT-XI:2607. Whittington financed the operation, provided supplies for manufacturing, and sold the finished drugs. RT-X:2572, RT-XI:2771. Garceau was the "cook," who mixed chemicals to produce methamphetamine. RT-X:2571, RT-XI:2770-71. Rambo helped cook and, with Susan, served as a lookout. RT-X:2573, 2571, RT-XI:2614. Susan testified Whittington paid them cash and methamphetamine to use the Rambo property. RT-XI:2622-23.

Several witnesses testified Garceau constantly "freebased" (smoked) cocaine. RT-X:2426 (Linda Rich); RT-X:2597-98, RT-XI:2640-41 (Susan); RT-XI:2831 (Whittington); RT-XII:3100 (Codd). Whittington provided Garceau with about $4,000 worth of cocaine each week for Garceau's participation in the drug manufacturing. RT-XI:2831-32. Susan testified Garceau stayed awake

6. Codd testified Garceau and Whittington manufactured methamphetamine in Tulare County prior to the move to Shandon. RT-XII:3064.

by smoking his cocaine pipe for the two to three days it took to prepare a batch of methamphetamine. *Id.*:2622. Whittington and Susan both testified Garceau frequently freebased cocaine, even when not manufacturing methamphetamine, and was rarely without cocaine for more than four or five days. *Id.*:2831-32. Codd stated Garceau "could put away an ounce of coke freebasing a day if he had it with him." RT-XII:3100. Linda Rich, Maureen's friend, testified Garceau freebased cocaine when Telesforo was present, although he was kind to Telesforo and gave him gifts, and that he had a stormy relationship with Maureen. RT-X:2426-27, 2418, 2425-26.

At the end of August or in early September 1984, Maureen and Telesforo joined Garceau, Whittington, Whittington's brother Bill, and Codd on a fishing trip at Lake Isabella. RT-X:2574-75, RT-XII:3067, 3086-87. Codd overheard an argument between Garceau and Maureen, in which Garceau threatened to kill Maureen because she planned to "snitch" to Eddie about the drug operation.[7] RT-XII:3067-68, 3087. According to Susan, Codd told her Eddie Nash, a.k.a. Edel Nasralla ("Nash") was Garceau's number one enemy, was Telesforo's biological father, and sought Garceau for his failure to fulfill a contract for which Nash had paid him. RT-XI:2661, 2713. Susan testified Garceau said he killed Maureen because "she wanted to go to Nash." *Id.*:2643.

Over objection, the prosecution presented evidence to establish Garceau's connection with Nash. RT-XI:2735-52. Michele Christie, who claimed to be Nash's former girlfriend, testified she saw Garceau at Nash's house. RT-XII:3000, 3002-03. Whittington testified he heard Garceau talk about Nash over the years, especially since Garceau had been with Maureen. RT-XI:2780-81. Nash denied he knew Garceau, Maureen, or Ms. Christie. RT-XI:2725-26. Officer Sylvester, who worked for the Los Angeles Police Department, Narcotics Division, Major Violators Section and who served a search warrant at Nash's home, *id.*:2754-55, and Judge Ronald Coen, who had previously

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7. Codd testified Garceau did not mention Eddie's last name. Neither the prosecution nor defense questioned Codd about whether he knew Eddie Nash or had heard Garceau speak of Nash.

prosecuted Nash, *id.*:2882, both testified about Nash's criminal activities and reputation for violence. *Id.* 2757-58, 2883.

On September 4, 1984, Maureen and Telesforo registered at a motel in Bakersfield. RT-X:2455-58. The motel manager recalled seeing Garceau on the premises that afternoon. *Id.*:2458-60. Telesforo paid daily for the room for the next two days. *Id.*:2461. Sometime late on the sixth of September, Garceau and the Bautistas moved to Patricia Shepard's ("Shepard") apartment. *Id.*:2473-74, RT-XI:2778.

Shepard, who then lived with Whittington, rarely used her apartment. RT-X:2481-82, 2519. Shepard kept the apartment in case she and Whittington separated, since he was married to another woman. *Id.*:2518. Whittington testified either he or Shepard gave Garceau a key to the apartment. RT-XI:2773.

Garceau called Whittington about midnight on September 6, 1984, and asked Whittington to meet him at Shepard's apartment. RT-XI:2776-77. When Whittington arrived, Garceau explained he and Maureen were fighting and left the motel because they were concerned someone would call the police. *Id.*:2778. Whittington noticed the telephone appeared to have been ripped from the wall. *Id.* Garceau said he was afraid Maureen was planning to "snitch him off" to Nash or Nash's attorney, and that Nash was scheduled to be released from prison the following day. *Id.*:2778-79. Garceau asked Whittington whether he was just being paranoid. *Id.*:2779. Whittington told him, "Yeah, it was all in his head, he was just paranoid over nothing." *Id.* When Whittington asked about Maureen and Telesforo, Garceau said they were sleeping. *Id.* Whittington did not see them nor hear any sounds from them. *Id.*:2779-80.

The next morning, Whittington was awakened by Garceau knocking at his front door. RT-XI:2781. Garceau entered and announced, "I did it. . . . I killed them. . . . I killed Maureen and the kid." *Id.*:2782. Garceau told Whittington that Maureen "was going to snitch me off. . . . I know how to take care of snitches." *Id.* Whittington stated Garceau said Telesforo was killed "because he was a witness, he seen [sic] him kill his mother." *Id.* When Whittington told Garceau to be quiet so Shepard would not overhear, Garceau replied she should know since the deaths occurred at her apartment, after which Shepard joined the conversation. *Id.*:2783.

Shepard testified Garceau told them he killed Maureen and Telesforo, RT-X:2487, that he slit their throats and demonstrated the manner of the stabbing. *Id.*:2489, 2508-09. Shepard testified Garceau said he knew how to take care of snitches, *id.*:2501; that he killed Maureen because they were arguing and killed Telesforo because he witnessed his mother's death. *Id.*:2489. Garceau told Shepard and Whittington that Telesforo had been afraid of "Jason," the fictional killer from the "Friday the Thirteenth" movie, but he should have been afraid of Garceau instead. RT-X:2502. A short time later, Garceau left Whittington's house driving Maureen's beige Honda Accord, saying he had to leave town. RT-XI:2783-84.

Susan Rambo testified Garceau sped into her yard on a Friday morning early in September,[8] driving Maureen's car. RT-X:2576, 2580, 2630. Susan stated Garceau was "very hyper, very -- not very coherent . . . very excited," rambling, "They wouldn't believe me. I kept telling them. They wouldn't believe me. . . . They should know what happens to snitches. I kept telling them. They wouldn't believe me. Now she's dead." *Id.*:2577-78. While smoking his cocaine pipe, Garceau explained Maureen was going to "snitch" on everyone in the drug operation. *Id.*:2578. Susan testified Garceau told her Telesforo began screaming when Garceau stabbed Maureen, that Garceau told him to shut up, then stabbed him when he did not, saying, "You have to take out all witnesses." *Id.* Susan noticed dark stains on Garceau's pants, and observed him later that day seated by her washing machine, naked, while the machine was operating. *Id.*:2579-80.

Later the same day, Greg Rambo left with Garceau, telling Susan they were going to Bakersfield to Shepard's apartment. RT-X:2581. Whittington testified Rambo and Garceau came to his house and talked about how to clean up Shepard's apartment. RT-XI:2786. Whittington and Rambo went to the apartment and placed the Bautistas' bodies in a dresser. *Id.*:2788, 2792-93. Whittington refused to continue assisting

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8. Monterey County District Attorney's Investigator Richard Lee testified that during his interview with Susan, she estimated the Friday when Garceau appeared to be September 7, 1984. RT-XIII:3496.

when Rambo "kicked down [Maureen's] shoulder" to make her body fit in the dresser. *Id.*:27943-94. Rambo returned to the apartment the next day with Garceau to remove the dresser containing the bodies. *Id.*:2796-98. Garceau and Rambo placed the dresser in a cardboard box and transported the dresser to the Rambos' house. RT-X:2583. They left the dresser behind the Rambos' house, and went to Los Angeles to retrieve Garceau's belongings from Maureen's apartment. *Id.*:2584-85. Garceau told Susan he was going to retrieve their things "so it would appear that all three of them were gone and disappeared at the same time." *Id.*:2582.

Rambo called Susan from Los Angeles and requested she contact his cousin, Doug Frederick, and have him dig a hole in their backyard. RT-X:2586, RT-XI:2659-60. Rambo instructed Susan to tell Doug the hole was for a new drainage system for the dog kennels in their backyard. *Id.*:2633, 2660. Susan did so. RT-X:2450, RT-XI:2634. Doug testified he dug the hole in early September 1984. RT-X:2446. Susan stated she awoke on Monday morning to the sound of Doug's backhoe operating on their property. *Id.*:2586, RT-XI:2660. Rambo had returned from Los Angeles by then, and was present during the digging of the hole. RT-X:2586, 2453.

Susan noticed the presence of several bags and boxes following Garceau's return from Los Angeles, along with a computer, a television, a stereo, and some guns. RT-X:2586-87. On Monday afternoon she also noticed the cardboard box which had contained the dresser was "flattened out." *Id.*:2587-88. At Garceau's request, Susan purchased cement to place over the dresser, *id.*:2589, bags for the bodies, and a needle and some string to sew up the bags. RT-XI:2657-58. During the next few days, Susan observed Garceau shoveling dirt into the hole. RT-X:2590.

Whittington and Shepard returned to Shepard's apartment a few days after the bodies were removed to clean up the bloodstains. RT-XI:2798-99, RT-X:2492. They were able to remove the visible stains, although those on the carpet required repeated effort to clean. *Id.*:2799. Shepard testified she purchased cleaning supplies, bags and duct tape, *id.*:2494-95, and helped clean the apartment. *Id.*:2502.

Susan Dalton ("Dalton"), Maureen's friend, reported Maureen missing near the end of September 1984. RT-XII:2993-94. Dalton last

spoke with Maureen on September 2, 1984. *Id.*:2993. The missing person's report was prompted in part by Dalton's visit to Maureen's residence, which appeared abandoned. RT-XII:2994. Photographs were scattered throughout the house, and it looked as if someone had "gone through" the house. *Id.*:2996. Garceau's clothes were gone, as well as Maureen's cars, stereo, television and Telesforo's computer. *Id.*:2994-97.

Susan Rambo explained that when Garceau told her about the killings, he reminded her to beware of what happens to "snitches," implying the same would happen to her if she said anything. RT-XI:2650. Garceau's threats made her afraid to contact the police, *id.*:2690-91, as did additional threats he made on subsequent occasions while he resided at their house through November, about the "law of snitches" and his habit of carrying a gun and knife. *Id.*:2715-16. Garceau told her, "You know what happens to snitches," took a kitchen knife, declared it to be "just about right," and made stabbing motions. RT-X:2591. Another time Garceau popped open a switchblade knife "he would play with . . . constantly" and stabbed a cardboard box she was carrying. *Id.*:2592. Garceau moved out of their residence in late November or early December of 1984 to a trailer house on her father's property in Parkfield, where he continued to manufacture methamphetamine. *Id.*:2591, 2594.

Susan recounted that Greg Rambo pistol-whipped her and placed a gun to her head on January 23, 1985, because he was angry at her failure to notice a pickup truck which had parked in their backyard. RT-XI:2668-69. Susan had an extended altercation with Rambo, who finally told her she had five minutes to get her stuff and get out. *Id.*:2671. Susan left for Parkfield to live with her parents. *Id.*:2662.

Susan last saw Rambo alive on February 19, 1985. RT-XI:2662-63. He had been drinking, was in a rage, and followed her around Shandon and neighboring Cholame. *Id.*:2663, 2666-67. Susan drove Garceau's Blazer at the time, as Garceau had asked her to pick up some groceries for him. *Id.*:2672-73. Susan was frightened by Rambo's behavior and decided to go to a friend's house in Gonzales. *Id.*:2672-74. She called Garceau to tell him she had left town in his Blazer and would not bring his groceries. *Id.*:2673. On the following day, Garceau telephoned and told her she could come home, that Rambo would "never

bother her again." *Id.*:2674. She feared Garceau meant Rambo was dead. *Id.*:2674-75.

Susan's father and brother then told her they saw Rambo go toward Garceau's trailer the previous day, heard gunshots, and then saw Garceau leave in Rambo's pickup. *Id.*:2676-77, RT-XII:3229-32, 3259-60. She later gave Garceau a sleeping bag when he requested "an old tarp or something to dispose of some things," which she assumed to be chemicals from the drug manufacturing. RT-XI:2677-78. Garceau also asked to borrow her father's bulldozer to dig a hole, but her father refused. *Id.*

Codd testified that in February 1985, Garceau called him and said he shot Rambo three times and killed him. RT-XII:3082. Garceau wanted Codd to come to Parkfield, but Codd was intoxicated when Garceau first called. *Id.* Garceau called again the next day, and Codd went to Parkfield the third day to see if Rambo was really dead. *Id.* Garceau told Codd he killed Rambo because he feared Rambo "was going to be a snitch." *Id.*:3070. Around the same time, while Garceau and Codd were watching a violent movie, Garceau confessed to killing Maureen and Telesforo. RT-XII:3068-69, 3106. Codd stated the movie nauseated Garceau, reminding him of what happened. *Id.*:3068. Garceau told Codd he "offed" Maureen and her son[9] by cutting them up. *Id.*:3069. Codd later asked and received Whittington's confirmation that Garceau confessed. *Id.*:3104.

Codd saw Rambo's body wrapped in a sleeping bag and a blanket, in a shed next to the Parkfield lab. RT-XII:3070-71. Codd agreed to move the body later. Garceau and Codd went to the trailer, where Garceau freebased cocaine. *Id.*:3072. Codd took some cocaine to stay awake, as he did not trust Garceau. *Id.* Garceau told Codd he wanted to dismember Rambo's body to prevent identification. RT-XII:3073. Instead, they drove to Tulare County, deposited Rambo's

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9. Codd referred to Maureen's son as "Brian," RT-XII:3087, stating that was how Garceau introduced him, and also what Maureen called him. *Id.* This inconsistency is minor and does not impact the fact that the rest of Codd's testimony is consistent with the other evidence presented at trial.

body in an orange grove, and returned to Codd's apartment. *Id.* The following morning, they retrieved the body and transported it to an isolated section of the county, dumping it in a ravine around Deer Creek. *Id.*:3073-74. Codd admitted he selected the site because Sheriff Bob Wiley owned the property, he hoped Rambo's body would be discovered, and Garceau would be unable to return to dismember the body. *Id.*:3076, 3010-11. Although Codd later led authorities to Rambo's body, when first questioned, he denied any knowledge of Rambo's murder. RT-XII:3105, 3112. Codd did not tell sheriff's deputies that Garceau had confessed to killing Maureen and Telesforo. *Id.*:3105-06.

Wayne James ("James"), another acquaintance of Garceau, testified Garceau hated "snitches" and told James he killed Maureen because she was going to "snitch him off," and that her son[10] walked in, so he had to "snuff him" too. RT-XII:3184-85. Garceau told James he killed Maureen and her son by stabbing them and cutting them up with a knife. *Id.* James had been involved in drug manufacturing with Garceau previously, and used and sold drugs. RT-XII:3185-86, 3189. At trial, James testified Garceau threw him a spent .38 cartridge, telling him it was the shell that killed Rambo. *Id.*:3184. Garceau also told James that he and Codd had disposed of Rambo's body the previous evening in a ravine outside Porterville. *Id.*:3184, 3187. James did not notify the police about Rambo's murder or the Bautistas' murders until a few days before he testified. *Id.*:3190.

On March 3, 1985, Susan reported her husband missing to the San Luis Obispo County Sheriff's Department. RT-XI:2681. She explained, despite her knowledge of evidence of Rambo's violent death, she "had a hope it wasn't true," and did not know for sure until Rambo's body was found. *Id.*:2684. She acknowledged she was the beneficiary of Rambo's $100,000 life insurance policy, and told Garceau she needed

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10. James also testified Garceau and Maureen introduced her son as "Brian." RT-XII:3188. Whether or not this is true does not impact the consistency of the remainder of his testimony when compared with the other evidence presented at trial.

to locate Rambo's body in order to collect the insurance. *Id.*:2673, 2684, 2722. Susan cleaned up the Parkfield shed which had concealed Rambo's body, RT-XI:2678-79; assisted friends in searching for him, *id.*:2686-87; and phoned Rambo's answering machine several times in front of others to fool them into believing she was attempting to locate Rambo. *Id.*:2687-88. She engaged in these activities due to fear of Garceau, Whittington, and Whittington's brother Bill, all of whom carried machine guns and automatic weapons. *Id.*:2689-90.

Near the end of February 1985, Susan was "very upset" and Garceau told her he did not think she "was going to hold up in front of questioning or . . . be able to keep up [her] part." RT-X:2596. Garceau gave her his driver's license so she would "get [his] name right if you snitch, if you go to the cops." *Id.* Susan interpreted his remark, made while his gun lay on the bed near them, as some kind of macho dare. *Id.* She replied she was attempting to avoid confrontations with anyone who would ask her questions. *Id.* Garceau told her he was "ready for the gas chamber . . . ready any time." *Id.*:2603.

On March 6, 1985, Susan contacted the Monterey County Sheriff's Department. RT-X:2601, RT-XII:3134. Her statements led, two days later, to the excavation of two bodies buried under a layer of concrete behind the house in Shandon. RT-XII:3135-37, RT-X:2370-77. Dental records confirmed the bodies were those of Maureen and Telesforo Bautista. RT-X:2415.

Dr. Karl Kirschner, a forensic pathologist, conducted autopsies on the Bautistas' bodies March 9, 1985. RT-X:2403-04. He opined the bodies had been buried at least four months. *Id.*:2409. Narrow cuts in the victims' clothing confirmed that they had been repeatedly stabbed. *Id.*:2410. Dr. Kirschner found Maureen had been stabbed eleven times in the chest. *Id.*:2404. "[A]ny one of [the wounds] could have been fatal" as each one entered the chest cavity. *Id.*:2408. Maureen suffered stab wounds to her ears and jaw while she was still alive, and was in severe pain from a cut nerve in her jaw. *Id.*:2405-06, 2408-09. Telesforo was been stabbed five times in the chest and twice in the back, causing fatal injuries to his lungs and heart. *Id.*:2410.

Expert testimony identified blood splatters found in Shepard's apartment as consistent with the infliction of stab wounds, with the Bautistas' blood types, RT-XII:3040, 3028, and the presence of

commercial detergent products. *Id.*:3035. Carpet fibers found in the dresser with the bodies were consistent with those obtained from Shepard's apartment. *Id.*:3047.

Monterey County Sheriff Office Investigator David Neely, and other Monterey and Tulare Counties officers, interviewed Codd on March 12, 1985, regarding Rambo's murder. RT-XII:3150-51. Codd eventually took them to where Rambo's body had been dumped, but it was too dark. They returned the next day and recovered Rambo's body. *Id.*:3105. Dr. Leonard Miller, the pathologist who performed the autopsy on Rambo's body, *id.*:3203-05, confirmed Rambo was shot three times, fatally by a wound to the heart, approximately three to four weeks earlier. *Id.*:3205-06.

Garceau was arrested at a coffee shop in Gorman on March 13, 1985. RT-XII:3336. At the time of his arrest, he claimed his name was Richard Brokaw, *id.*:3338, a name he had used to register at a nearby motel. *Id.*:3150. A search of Garceau's vehicle and motel room resulted in the seizure of several types of ammunition, loose cartridges, a clip, shotgun shells, *id.*:3141, 3143-45, and Garceau's wallet, which contained documents or identification in five names, including his own and that of Greg Rambo. *Id.*:3146-47. Shortly after his arrest, Garceau telephoned Codd, stating that he had been "snitched off" and was "going to get the pill." *Id.*:3078-79.

Richard Lee ("Lee"), a Monterey County District Attorney's investigator, witnessed Garceau's April 4, 1985 statement while Garceau was incarcerated in the Monterey County jail (in connection with Rambo's murder. Garceau asked, "So you guys aren't going to try me; is that right?" RT-XII:3351-52. Lee replied Garceau would be tried in Kern County for the Bautista murders before the trial in Monterey County for Rambo's murder. *Id.*:3352. Garceau replied this was stupid because, "They can only gas me once. They can only take my wheels one time. Do you know what I mean?" *Id.* Lee responded, "Come on, Bob, that's negative vibes." *Id.* Garceau laughed and said, "Yeah, negative vibes, that's right. I'm still breathing and there's a few people who ain't." *Id.* Garceau then laughed again. *Id.*

The defense sought to establish that one or more of the other participants in the Shandon drug operation had both the motive and opportunity to commit the Bautista and Rambo murders. The defense

called witnesses to cast doubt on the credibility of the key prosecution witnesses. In particular, the defense concentrated on Whittington's evasive and occasionally contradictory pretrial testimony, his cover-up of the Bautista murders, his drug involvement, criminal record, and willingness to lie. RT-XI:2807-73. The defense offered testimony aimed at undermining Susan's credibility by revealing her drug involvement, her knowledge of and silence about the murders, and emphasized her odd behavior after Rambo's disappearance. *Id.*:2606-2707, 2723-24. The defense suggested Susan might be involved in Rambo's murder, to pursue an intimate relationship with Garceau and to collect on Rambo's life insurance policy.

At the penalty phase, the prosecution introduced stipulations establishing that Garceau had been convicted of a second degree burglary in 1972 and possession of a silencer in 1981, both felonies. RT-1:41. Over defense objection, the prosecution presented evidence of Garceau's possession of firearms in 1981 and 1982, and of his involvement in an alleged kidnapping in 1982.

Los Angeles Officer Douglas Gerst ("Gerst") testified he recovered numerous weapons during two 1981 searches of a residence in Canoga Park. RT-1:42-43. The weapons included a Mac Ten machine gun with a silencer, two automatic pistols, six revolvers, six rifles, and twelve shotguns. *Id.*:43-45. Gerst testified that thousands of rounds of ammunition were found inside the residence, and utility receipts established Garceau resided there. *Id.*:46.

Diane Sems testified about an incident in June 1982, in which her former boyfriend, Terry Fabricant ("Fabricant"), forced her into a pickup truck driven by another man. RT-1:53, 60. Ms. Sems was blindfolded and driven to a house she did not recognize, *id.*:53-54, where she observed guns. *Id.*:56. She was forced by Fabricant to ingest drugs and was beaten by Fabricant. *Id.*:55, 58-59. After Fabricant fell asleep hours later, she escaped. *Id.*:55. The next day, no longer under the influence, she identified the driver of the pickup from a police photo lineup. *Id.*:57. Ms. Sems testified Garceau resembled the driver, although she was uncertain and admitted she could not now identify the driver. *Id.*:57-59. Fabricant testified he knew Garceau in June of 1982, and that Garceau drove a pickup truck at the time. RT-1:62. Fabricant was not questioned about nor did he testify regarding the alleged kidnapping.

Los Angeles Detective Philip Quartararol ("Quartararol"), conducted the photo lineup with Ms. Sems. Ms. Sems did not appear under the influence at the time and Ms. Sems identified Garceau as the driver of the pickup. *Id.*:64-65. Det. Quartararol obtained a search warrant for 21027 Runnymede as a result of Ms. Sems's complaint, the same house Gerst had searched one year earlier, and recovered two semiautomatic weapons, two shotguns, and several thousand rounds of ammunition. *Id.*:66. Under the law in effect at the time, possession by a felon of the weapons recovered in the search were not illegal, since the weapons were not concealable. *Id.*:68-69.

The defense presented evidence in mitigation relating to Garceau's prison history, his upbringing and character, and his caring relationship with a woman and her young daughter. The defense submitted Garceau's file from prison ("cum file") for admission into evidence, arguing it indicated he adjusted well to prison, that he was a "model prisoner." RT-1:131-32.

Russell Garceau ("Russell"), Garceau's younger brother, RT-1:133-34, described Garceau's positive attributes and the repeated adversity he had faced throughout his life. Garceau was an intelligent child, an avid reader, and won poetry and art contests, *id.*:138, in spite of a childhood illness which separated him from other children, required hospitalization, and caused him to miss "quite a bit of his childhood." *Id.*:135. Russell told of their father's firearm collection. When Garceau was in junior high, he took one of their dad's guns to school to show his friends. RT-1:136-37. Upon arrival, Garceau decided it was the wrong thing to do and gave the gun to a school administrator with whom he had a good relationship. *Id.*:137. As a result, Garceau was arrested and placed in a detention hall, where he was frequently beaten before he was released. *Id.*:137-138.

Garceau joined the Army in 1965, when he was 16 years old, and served in the States and Vietnam, until his honorable discharge three years later. RT-1:138-39. Garceau seemed bitter when he return from Vietnam. *Id.*:139-40. Garceau moved from Ohio to California around 1969. Russell followed two years later. *Id.*:140. Garceau was unemployed at the time Russell moved. Russell believed Garceau was committing burglaries for a living. *Id.*:142. Garceau was eventually arrested for burglary and imprisoned. *Id.* Upon his release from prison,

Garceau was proud to be one of the few people in prison who had not been involved in violence or drugs. *Id.*:143.

In 1976, Garceau started a horse ranch on three to four rented acres in Chatsworth and attempted to start a hayriding business. RT-1:144-45. Russell believed Garceau was not involved in criminal activity during the two to three years he lived on the ranch, and that Garceau did not own any guns during this period. *Id.*:145-46. When the land was sold, Garceau sold his possessions and left the ranch. *Id.*:146.

Garceau had a generous nature; "he used to borrow money from me to give to [a] blind man . . . ." RT-1:147. Garceau repaid his debts, and made three years of automobile loan payments for the widow of a deceased business partner. *Id.*:147-48. Garceau often forgave the debts of others, *id.*:148-49, and after their father's death, kept in touch with their mother who lived in Ohio. *Id.*:149.

During the 1980's, Garceau "started on drugs . . . that's when I saw his whole personality change . . . . Up to that time I thought he was probably the most honorable person I had ever met . . . . Then he started getting involved in cocaine and then all of a sudden he wouldn't show up when he was supposed to, he wasn't paying back like he used to pay back his loans and in a sense, to me, became flaky, his whole life seemed to change at that time. . . ." RT-1:150-51.

Starr Calliez was introduced to Garceau by Russell in 1973, while Garceau was in prison. RT-1:154. Ms. Calliez corresponded with Garceau, visited him in prison several times, and formed an intimate relationship with him after his release. *Id.*:154-56. Ms. Calliez found Garceau "very intelligent [and] very sensitive," *id.*:158, and he was "very friendly and nice" to her six-year-old daughter, *id.*:157, bought her gifts and engaged in activities as a family. *Id.*:156-57. Ms. Calliez acknowledged Garceau did not adjust well to life outside prison, but she never knew him to use drugs or be violent. *Id.*:158-59.

Ms. Calliez's relationship with Garceau ended, and in 1983 she married someone else. RT-1:159-60. Ms. Calliez was "shocked" to learn of Garceau's involvement in the activities described at trial. *Id.*:161. Despite the evidence of Garceau's murder of a mother and child, Ms. Calliez "would still feel comfortable if she and her daughter were alone with Garceau." *Id.*:161-62.

VI. Analysis

Claim A - Ineffective Assistance of Counsel at Guilt and Penalty Phases

To establish trial counsel's performance was constitutionally defective, Garceau must satisfy the two-prong test from *Strickland v. Washington*, 466 U.S. 668 (1984). First, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "The ultimate question is whether counsel's 'representation fell below an objective standard of reasonableness.'" *Dyer v. Calderon*, 122 F.3d 720, 732 (9th Cir. 1997) (*citing Strickland*, 466 U.S. at 688). "We will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (en banc). Although we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, "counsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (*citing Strickland*, 466 U.S. at 691).

Second, "that the deficient performance prejudiced the defense." *Bonin v. Calderon*, 59 F.3d 815, 833 (9th Cir. 1995) (internal quotations and citations omitted). The prejudice component focuses on "whether counsel's deficient performance renders the result of the trial unreliable or the proceedings fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The test looks to whether there is a reasonable probability that without counsel's unprofessional errors the "result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

1. Failure to Investigate Eddie Nash.

Garceau offers evidence he contends was available at the time of trial, from Ace T. Karter and Jeffrey Sera, as well as from Nash himself, to establish that Garceau and Nash did not know each other. *See* Exs.

59, 67 and 62 to petition. This evidence purportedly impeaches the prosecution's theory for the murders, that Maureen was going to "snitch off" Garceau to Nash. Garceau argues the evidence would defeat the prejudicial impression of Garceau's association with Nash, which was "improperly exploited" by portraying Nash's reputation for violence.

The State notes that Nash himself denied knowing Garceau; the testimony of Mr. Karter and Mr. Sera lacks foundation, is speculative and inadmissable as improper opinion evidence; and in light of Nash's denial at trial that he knew Garceau, the proposed evidence was cumulative.

Ace Karter states he had known both Nash and Garceau for a number of years and declares he is "sure they did not know each other." Ex. 59:4. Jeffrey Sera, who committed burglaries with Garceau, never heard Garceau mention Nash, and does not "think [Garceau] knew Nash or was connected to him in any way." Ex. 67:1-2. Eddie Nash repeats his trial testimony, denies he knew Garceau and states he told the prosecutor before he testified that he did not know Garceau. Ex. 62:1.

The record belies Nash's credibility. Substantial evidence supports the jury's disbelief of Nash's denial he knew Garceau. That Garceau did know Nash was corroborated by testimony from Whittington and Susan, both of whom stated Garceau talked of Nash, more often after Garceau became involved with Maureen. RT-X:2592, RT-XI:2627, 2661, 2713 (Susan); RT-XI:2778-80 (Whittington). Ms. Christie saw Garceau at Nash's house during the period she lived with Nash and believed from the way Nash treated Garceau that he was doing business with Nash. RT-XII:3002-04.

Mr. Sera claims he was interviewed by a defense investigator prior to Garceau's trial, but was not called to testify. The State observes it was eminently reasonable for defense counsel not to call Mr. Sera, whose testimony about contact between Garceau and Nash was equivocal, cumulative to Nash's denial, and an opinion based on speculation. If Mr. Sera had testified, the fact that he and Garceau committed burglaries together would have been revealed. Mr. Sera's potential testimony was more prejudicial than probative.

Defense counsel strenuously argued Nash's denial he knew Garceau and vigorously sought to exclude the testimony of Judge Coen, Officer Sylvester and Ms. Christie, on the grounds the association

between Nash and Garceau was too tenuous, and such testimony was grossly prejudicial, outweighing its probative value. RT-XI:2735, 2737, 2740, 2744, 2765 and 2884. The trial judge disagreed. Even assuming counsel's performance was deficient for failing to locate and/or present the testimony of Mr. Karter and Mr. Sera, prejudice cannot be shown. In light of evidence presented at trial, the ambiguous and speculative opinions of Mr. Karter and Mr. Sera about Nash's knowledge of Garceau would not have substantially influenced the jury's verdict.

2. Failure to Investigate or Present Impeachment Evidence.

Garceau seeks to present evidence of Wayne James's January 1987 arrest in Kern County, to show James testified falsely when he said he was not in Kern County from June 1986 to May 1987. There was sufficient evidence attacking James's credibility to assure that this further inconsistency in James's testimony did not substantially influence the jury's verdict. Even assuming counsel's performance was deficient, there is no prejudice.

Garceau also seeks to present allegedly impeaching evidence that Shepard was charged in June of 1984 with aiding and abetting the flight of Michael Edward Marberry ("Mike") to avoid arrest and possession of a controlled substance and paraphernalia. Petition, Ex. 31 consists of copies of police reports and court documents concerning the attempted murder of Linda Marberry by her husband Mike. Mike was arrested at Shepard's apartment the same evening his wife was shot. Shepard was arrested for harboring a fugitive and charged with possession of drugs she had when taken into custody. The harboring charge was dismissed on June 8, 1984, after evidence at Mike's preliminary hearing was insufficient to show Shepard was involved in or had knowledge of the attempted murder. Shepard was admitted to a drug diversion program on July 3, 1984, and the drug charges against her were stayed.

At most, the evidence Garceau proffers shows that Shepard used drugs and was involved with a married man, not her husband. This evidence is no more damaging than admissions made by Shepard at trial. Shepard admitted living with Whittington, a married man, for four or five years, RT-X:2517, to lying to authorities, *id.*:2516, 2554, to deriving

her income from the drug business, *id.*:2546, and to allowing her apartment to be used for drug transactions. *Id.*:2505. The additional character evidence Garceau proffers is inconsequential and cumulative. Shepard's testimony about Garceau's confession to the murders of Maureen and Telesforo was corroborated by numerous other witnesses and physical evidence. There is no prejudice. Counsel was not deficient for failing to discover and/or present evidence of the 1984 charges against Shepard, nor would such evidence have substantially influenced the jury's verdict.

3. Failure to Investigate or Present Defense of Diminished Actuality.

Garceau offers trial counsel Stanley Simrin's declaration to establish his own ineffectiveness for alleged failure to conduct an appropriate investigation or consult with appropriate experts to make an informed decision to forego a diminished actuality defense. *See* Ex. 49. Mr. Simrin knew of Garceau's drug use at the time of trial, of cocaine's effects on mental functioning and behavior, and that Garceau's mental state was a potential defense and a potential factor in mitigation. *Id.*:3. Mr. Simrin retained a psychologist, David Marlow, as a consultant, although he did not inquire whether Dr. Marlow was qualified in the area of cocaine dependance. *Id.* Mr. Simrin did not investigate the extent of Garceau's drug use or its effect on his functioning or behavior, nor did he supply Dr. Marlow with background documentation of Garceau's drug use. *Id.* Mr. Simrin did elicit testimony from percipient witnesses about Garceau's drug use at the guilt phase. Based on this evidence, he sought to have the jury instructed regarding voluntary intoxication and diminished actuality. Ex. 49:4.[11]

Garceau seeks to present expert testimony from Dr. Craig Haney, Dr. David Smith, and percipient witnesses, about his abuse of cocaine, symptoms of post-traumatic stress disorder ("PTSD"), and deteriorating

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11. *See* Claim S below.

mental condition.[12] It is unlikely the jury's verdict at the guilt phase would have been different had expert testimony of the effects of cocaine psychosis been presented, even with testimony of any effects military service had on Garceau, the verdict would not have been different in light of the evidence presented at trial of Garceau's conduct before and after the murders. Prejudice cannot be shown.

None of the proffered evidence shows Mr. Simrin provided ineffective assistance at the guilt phase. The defense asserted throughout the trial, and argued strenuously during closing, that the prosecution had not met the burden of proof because the evidence implicated the main prosecution witnesses, Whittington, Shepard, Susan and Codd, more than it implicated Garceau. This was a reasonable tactical choice in light of the limited physical evidence against Garceau and the problems inherent in a diminished actuality defense.[13] The decision not to spend

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12. *See* declarations of experts, Exs. 48 and 50, along with declarations of percipient witnesses, Exs. 68 (Raymond Sucharski), 60 (George LePicard), 59 (Ace Karter), 66 (Walter Seifert), 71 (Whittington), 61 (Ronald Miller, Esq.), 72 (Shepard), 63 (Susan), 55 (Fabricant), 57 (Russell), 67 (Jeffrey Sera), 54 (Dalton), and 70 (Bill Whittington). The declarations of Whittington, Shepard, Susan and Russell are mainly consistent with their respective trial testimonies. Mr. Sucharski tells of the experiences he and Garceau had in Vietnam. Mr. Seifert and Mr. LePicard tell of their observations of Garceau's symptoms of PTSD. The remaining declarants, as well as Mr. LePicard, tell of Garceau's drug use and the effect such use had on his functioning and behavior.

13. The decision not to rely primarily on a diminished actuality defense (which essentially asserts that because Garceau voluntarily used large amounts of drugs for so long he did not realize what he was doing and should not be responsible), was reasonable, where another defense was available, since it was likely a diminished actuality defense would not favorably influence the jurors. *See* Claim B below.

scarce resources on contradictory defenses is tactical, not deficient performance. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1068 (1999). It is not ineffective for counsel to choose not to present evidence which contradicts the primary defense theory. *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 450 (1998).

Mr. Simrin elicited testimony at the penalty phase about Garceau's drug use from Garceau's brother Russell, his friend Starr Calliez, and attempted to humanize Garceau for the jury by showing his generous and caring nature. RT-1:143, 145, 147-50, 156-58. The legal standard of sufficient investigation is different for the penalty phase than for the guilt phase. *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). Evidence of mental problems, although insufficient to establish a legal defense at the guilt phase, may be offered in mitigation at the penalty phase. *Id.* In *Hendricks*, counsel was found ineffective for failing to investigate and present evidence in mitigation of the defendant's "nightmarish upbringing and mental problems," as it was not possible this evidence could have prejudiced Hendricks. *Id.*

Here, evidence of Garceau's cocaine use and its effect on his behavior was not necessarily mitigating. Rather, the evidence was potentially prejudicial since his drug use was voluntary, he made his living manufacturing and trafficking in drugs, and knew the adverse effects drug use had on him. *See* Claim B below. The new drug use witnesses are cumulative to evidence presented at the guilt and penalty phases.[14] Mr. Simrin was not ineffective for failing to further investigate and present more evidence of Garceau's drug use. Substantial evidence proves Garceau's drug use was voluntary and that Garceau and those around him knew well the effect drugs had on him.

Garceau offers testimony from Jurors Briscoe, Gaines and Kalar that the drug use evidence that was presented had only "slight impact" on the verdict. *See* Exs. 53, 56 and 58 to the petition. Jurors may not

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14. It was a reasonable tactical decision to utilize prosecution witnesses to present evidence of Garceau's drug use, based on the perception they had less bias in Garceau's favor.

testify to what effect any evidence has on their thought processes or how it influenced the verdict. Federal Rules of Evidence, Rule 606 (b). *See also*, California Evidence Code § 1150 (juror statements are inadmissible to show influence of evidence on a verdict) and California Penal Code § 1181[15/] (juror testimony admissible only to show objective misconduct, i.e., verdict by lot, consideration of non-admitted evidence). The proffered declarations improperly offer to show jurors' hypothetical impressions as to the effect such evidence would have had on their verdict. Such evidence is inadmissible.

4. Failure to Investigate or Present Evidence of Vietnam Experience and Post-Traumatic Stress Disorder.

Garceau proffers evidence of the long-lasting effects he suffered from his Vietnam experience, that he was certain he would be killed, and of his continuing symptoms of PTSD after his return. *See* Exs. 48 (Dr. Haney), 68 (Sucharski), 60 (LePicard), 59 (Karter) and 66 (Seifert).[16/]

Mr. Sucharski recounts experiences he shared with Garceau in Vietnam; that both of them thought they would not survive; and how they used alcohol and marijuana to block out the terror. Ex. 68. Mr. LePicard, Mr. Karter and Mr. Seifert all met Garceau after his return from Vietnam. Mr. LePicard states Garceau talked about being shot at and seeing people shot, and that he was "messed up emotionally" from his Vietnam experience. Ex. 60. Mr. Karter and Mr. Seifert frequently observed Garceau experience nightmares and wake up screaming and in a cold sweat. Ex. 66. Dr. Haney opines many of Garceau's actions, as revealed by Mr. LePicard, Mr. Karter and Mr. Seifert, are classic

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15. Unless otherwise indicated, all statutory references are to the California Penal Code.

16. Garceau also presents statements by Jurors Briscoe and Gaines of the potential effect evidence of Garceau's military record would have had on the verdict. *See* Exs. 53 and 56. Juror statements of the effect of evidence upon the verdict are improper and not admissible.

symptoms of post-traumatic stress. Ex. 49:11-14. Dr. Haney concludes Garceau's drug dependance resulted from attempts to self-medicate the "emotional, cognitive, and behavioral problems" he was not equipped to solve on his own. *Id.*:16-17.

It was not deficient performance for Mr. Simrin to omit evidence of Garceau's Vietnam experience and subsequent symptoms of PTSD, since there is no evidence Mr. Simrin knew of the problems Garceau's friends now reveal. In *Babbitt v. Calderon*, 151 F.3d 1170, counsel was not ineffective for failing to investigate and present evidence of post-traumatic stress disorder, as it was cumulative of evidence already received and the defendant was reluctant to talk of it. *Id.* at 1176. Here, Mr. Simrin states he had no knowledge of Garceau's symptoms of PTSD, although he did know of his military service. There is no indication Garceau mentioned these symptoms to Mr. Simrin. It was reasonable for Mr. Simrin to focus investigation on areas which showed a potential benefit, especially in the absence of some indication of PTSD. Whatever his Vietnam experience, from his return until the time of the murders Garceau pursued an active criminal lifestyle manufacturing and trafficking in drugs that went far beyond drug abuse.

5. Failure to Investigate or Present Evidence of Drug Abuse.

Garceau asserts his alcohol and drug use began while he was in Vietnam, and escalated after his return. *See* Exs. 68 (Sucharski), 59 (Karter), 48 (Dr. Haney), 60 (LePicard), 71 (Whittington), 72 (Shepard), 63 (Susan), 55 (Fabricant), 57 (Russell), 67 (Sera), 54 (Dalton), and 70 (Bill Whittington). Garceau claims he suffered extreme psychological consequences from excessive drug use. He tenders expert opinion that his mental functioning was severely impaired and he suffered from a cocaine-induced psychosis at the time of the murders. *See* Exs. 50 (Dr. Smith), 48 (Dr. Haney) and 61 (Miller, Esq.).

Claim B reveals no prejudice from the failure to present additional percipient witness testimony, or expert testimony, at the guilt phase. The evidence of Garceau's words and actions before and after the killings gave the jury substantial evidence to conclude that Garceau was able to premeditate and deliberate the killings. He had motive and

opportunity, lived with the victims, and talked of the need to eliminate them as potential witnesses. It was not deficient performance for Mr. Simrin to focus on less prejudicial mitigating evidence at the penalty phase. Juror testimony about the effect of such evidence on the verdict is inadmissible.

6. Failure to Investigate or Present Readily Available Medical and Psychiatric Evidence in Mitigation.

Garceau offers to prove counsel was ineffective for failing to present the following available mitigation evidence: (1) a social and medical history and a determination of mental status, (2) effects of PTSD, (3) cocaine psychosis, (4) suicide and remorse manifestations, and (5) results of a competent mental evaluation to explain the conviction for Rambo's murder and the alleged kidnapping of Diane Sems. Garceau contends evidence of institutional failure and of his likely adjustment to prison should have been presented in mitigation. *See* Ex. 48 (Dr. Haney's social history), 52 (Belcher), 57 (Russell), 68 (Sucharski), 7 (military records), 8 (California Department of Corrections records), 66 (Seifert), 49 (Simrin), and 58 (Juror Kalar).[17/]

Dr. Haney's social history reveals: that Garceau sustained repeated beatings while in a juvenile institution; of the general harmful environment in Ohio Juvenile Facilities; that Garceau changed after Vietnam; of Garceau's post-traumatic stress disorder; of the effects of Garceau's drug use on his personality and behavior; and that Garceau's drug use was motivated as self-medication for stress.[18/] The beatings in

17. Juror Kalar's declaration is not admissible for this purpose.

18. Garceau presents the declaration of Jack Belcher, his school psychologist at the time he was incarcerated as a juvenile. Garceau was arrested for bringing a gun to school. Mr. Belcher states he believed Garceau was in an abusive home, and that Garceau said he needed the gun to run away from home. Ex. 52:1. Conversely, Garceau's brother Russell testified Garceau took the gun to school to show classmates a sample of his father's gun collection. RT-1:137. Russell gave no indication they came from an abusive home.

juvenile detention and Garceau's change after Vietnam were testified to by his brother Russell. RT-1:137-38, 139-40. The failure to present evidence of Garceau's Vietnam experience, symptoms of post-traumatic stress disorder, and the effects of and motivations for his drug use are discussed above.

Mr. Simrin's failure to present evidence of the general harmful environment of Ohio Juvenile Facilities when Garceau was incarcerated was not deficient performance. It is not clear that when Garceau was incarcerated the staff at his Ohio facility treated juveniles in a degrading manner, or that they were "hostile, indifferent, condescending or self-seeking." Ex. 48:9. Even assuming these facts were proved, their effect on the verdict is speculative. Garceau stayed out of trouble for about three years after his stay in the Ohio facility, and then served three years in the military with an honorable discharge. RT-1:136-39.[19/] No prejudice can be shown from Mr. Simrin's failure to present this evidence in mitigation.

Garceau also refers to California Department of Corrections documents from his incarceration in Monterey County for Rambo's murder. Ex. 8. These documents mainly focus on Garceau's suicide attempt, but do not provide insight into the motivation behind Garceau's actions nor constitute manifestations of remorse. The jury could have concluded the suicide attempt resulted from Garceau's consciousness of guilt for the conviction of Greg's murder four weeks earlier, not from

19. Garceau's military records, submitted in this proceeding, were not presented to the jury. This was a reasonable tactical choice by counsel as the military records included a juvenile conviction for fighting in 1962 (which occurred after the gun charge) and two violations of the military code in 1965, disobeying a lawful order of a superior and carrying a concealed weapon (knife), that were not disclosed to the jury. Ex. 7.

remorse. The mitigating value of these documents is minimal. The failure to present them was not deficient performance.

7. Failure to Adequately Investigate and Defend Against Charges in Aggravation.

Garceau refers to evidence, available at the time of trial, which he claims should have been offered to rebut evidence in aggravation: (1) the opinion of attorney Ronald Miller about the lack of evidence supporting the kidnapping charge, *see* Ex. 61, and (2) Fabricant's statement that the incident with Ms. Sems was not kidnapping, because she entered the truck voluntarily. *See* Ex. 55.

Mr. Miller represented Garceau against the kidnapping charge in 1982. He discovered an eyewitness, a gas station attendant, who saw the victim voluntarily depart with two men. Ex. 61:2. Mr. Miller asserts that after the prosecutor interviewed this witness, the kidnapping charges against Garceau were dismissed. *Id.* Mr. Miller interviewed the alleged victim, who said she voluntarily remained at the house with Garceau and Fabricant. *Id.*:3.

Fabricant declares Ms. Sems was his girlfriend at the time, that she called from a gas station and asked him to pick her up, and that she entered Garceau's truck voluntarily. Ex. 55:1-2. Fabricant states Ms. Sems went to the authorities to withdraw her complaint, saying she had not been kidnapped. *Id.*:2. The charges against Garceau and him were dismissed for lack of evidence. *Id.*

The prosecution called Ms. Sems to testify at the penalty phase. She explained Fabricant picked her up, blindfolded her, took her to an unknown house, forced her to take drugs and beat her. RT-1:53-56, 58-60. She testified they drove around in a truck for about an hour before going to the house, *id.*:54; that she was kept at the house for an indeterminate period of time, maybe four to five hours, *id.*:55, 60; and that she was not Fabricant's girlfriend at the time of the abduction. *Id.*:60. She escaped when Fabricant fell asleep on the couch and while the other people at the house were in the kitchen. *Id.*:55. She was unable in court to positively identify Garceau as the driver of the truck. *Id.*:57-59.

Fabricant was then called by the prosecution. Fabricant testified

he knew Garceau in 1982; that Garceau lived in Canoga Park at the time, but he did not know the name of the street; and Ms. Sems was Fabricant's girlfriend at the time. RT-1:61-62. LAPD Detective Quartararol interviewed Ms. Sems two days after the incident, at which time she identified Garceau from a photo line-up as the driver of the truck. *Id.*:63-65.

The jury heard Ms. Sems's detailed account of her abduction and treatment, which implicated Fabricant. Fabricant now denies there was an abduction and asserts Ms. Sems recanted shortly after she filed the police report. Ms. Sems's alleged recantation is explainable since victims of domestic violence often falsely recant, either from fear or from a misguided notion that they are helping their abuser. In light of her testimony at trial, Ms. Sems's alleged recantation was a credibility issue. Mr. Miller's opinion, an advocate's legal conclusion, is not helpful. The eyewitness could have misconstrued Ms. Sems's actions, interpreting them as voluntary when they were not. There is no indication of the distance of the eyewitness from the truck, nor whether the view was unobstructed. In light of trial evidence, Mr. Miller's statements are improper opinion and speculation.

8. Failure to Object to Prosecutorial Misconduct During Penalty Phase Closing Argument.

Garceau charges counsel was ineffective not to object, move to strike, or seek admonition for alleged instances of prosecutorial misconduct: (1) false and unreliable remarks regarding his future dangerousness, (2) improper remarks about Telesforo's status, (3) intentionally misleading the jury to consider mitigating evidence in aggravation, (4) to refuse to consider sympathy evidence, and (5) to give aggravating weight to the lack of mitigating psychological evidence. Mr. Simrin asserts there was no tactical reason for his failure to object.[20] Garceau proposes to call a *Strickland* expert to opine that counsel's

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20. Mr. Simrin's declaration, however, does not mention the prosecutor's closing argument in the penalty phase, nor address any alleged failure to object. Ex. 49.

failure to object during closing was prejudicial. Such opinion testimony is a legal conclusion not helpful to resolve the claim. Fed. R. of Evid., Rule 702.

Nothing in the record or pleadings show Mr. Simrin's failure to object was not a tactical decision. To justify relief, the prosecutor's penalty argument must amount to prejudicial misconduct. Garceau argues the prosecutor's remarks about his future dangerousness were false and prejudicial. "The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing the appropriate punishment." *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) (*citing California v. Ramos*, 463 U.S. 992, 1008 (1983) ("once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.")).

Here, the prosecutor's comments on Garceau's future dangerousness were based on the evidence; the "cum file" of his 1972 prison records; the increasing violence of his crimes, from burglary to possession of illegal firearms to three murders. RT-1:171-74. He argued the evidence proved Garceau's indifference to human life and the gratuitous violence of the murders. *Id.*:174-76, 179. The argument of future dangerousness was based on legally admitted evidence, consistent with the "open and far-reaching argument" the Constitution permits. *People v. Davenport*, 41 Cal. 3d 247, 288 (1985) (*citing Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976)).

Garceau complains of improper comment on Telesforo's status as a defenseless, vulnerable victim, contending there was no evidence supporting this speculative portrayal. Telesforo's photograph was admitted into evidence during the guilt phase. From this, the jury could make its own determination about Telesforo's age, physical size and condition. This was only a minor part of the prosecutor's argument. The prosecutor's repeated references to the jury's duty to consider all the evidence and to give it the weight they thought it deserved, made inconsequential the reference to Telesforo's vulnerability.

Garceau asserts the prosecutor mislead the jury by arguing that mitigating evidence should be considered in aggravation. The prosecutor

may argue for imposition of the death penalty and against mitigation. "Both the prosecution and the defense may present valid arguments as to the significance of the [sentencing factors] in a particular case." *Tuilaepa v. California*, 512 U.S. 967, 977 (1994). Competing arguments bring perspective to an issue and promote a reasoned decision. *Id. See also, People v. Fosselman*, 33 Cal. 3d 572, 580 (1983) (prosecutor may vigorously argue the case).

The prosecutor repeatedly directed the jury to the evidence and informed them it was their job to determine what weight to assign to any evidence. The prosecutor's argument that mitigating evidence was outweighed by evidence in aggravation was not improper. A prosecutor may lawfully argue that the mitigating evidence is entitled to little weight and is substantially outweighed by the aggravating factors. *People v. Jones*, 15 Cal. 4th 119, 184 (1997) (*citing People v. Cox*, 53 Cal. 3d 618, 683 (1991)), *overruled on other grounds by People v. Hill*, 17 Cal. 4th 800, 823 (1998). Nor is it improper for a prosecutor to characterize evidence offered in mitigation as aggravating. *Tuilaepa*, 512 U.S. at 977.

The prosecutor's argument regarding sympathy was not improper. He told the jury the decision was theirs alone, that they must be guided by the evidence, and that they could consider sympathy and mercy. RT-1:169-71. The prosecutor later argued the granting of any mercy should be limited by the evidence of the crime, asking how much mercy Garceau showed to Telesforo. *Id.*:180. This was not misconduct; such comment on the evidence was factually justified.

People v. Davenport, 41 Cal. 3d 247 (1985), held a prosecutor could not argue that the lack of evidence as to certain mitigating factors, subd. (d), (g) and (h) of § 190.3, rendered them aggravating factors.[21/]

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21. The pertinent part of § 190.3 is as follows: ". . . (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . . (g) Whether or not the defendant acted under extreme duress or under the substantial dominion of another person. [¶] (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his

Id. at 290. *People v. McDowell*, 46 Cal. 3d 551 (1988), addresses similar argument that a lack of evidence that the defendant was influenced by mental or emotional disturbance or affected by intoxication or mental disease, was a "factor in aggravation." *Id.* at 573-74. However, the error was harmless because the defense argued the contrary, the jury was properly instructed, and the jury was fully aware of the underlying facts and was free to place whatever weight it wished upon those facts. *Id.* at 574.

The record here shows the prosecutor did not argue the lack of mitigating evidence was a factor in aggravation. Although the prosecutor strenuously argued the evidence justified a death verdict, he repeatedly directed the jury to consider all the evidence, and told them it was their job to assign their own weight and values to the sentencing factors. There was no prosecutorial misconduct during closing argument; Mr. Simrin's failure to make unjustified objections was not deficient performance. Claim A is denied on the merits.

- Claim B - No Requisite Mens Rea for Murder

Garceau asserts his conviction and sentence are unconstitutional because he did not form the requisite intent for first degree murder due to his chronic cocaine use. Garceau claims freebasing cocaine for at least five years prior to the murders rendered the drug more addictive and had a greater impact on his mental capacity. Garceau contends he suffered from cocaine psychosis at the time of the murders and that he did not form the requisite intent for first degree murder.[22/]

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conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication."

22. Factually related to this claim are subsections (3) through (5) of Claim A: Ineffective assistance of counsel for failure to investigate and present the defense of diminished capacity, failure to investigate and present evidence of Garceau's experience in Vietnam and of PTSD, and failure to

Before Garceau's trial, California abolished the defense of diminished capacity and limited the scope of psychiatric testimony. *See* §§ 22, 28-29.[23/] Evidence of mental illness "shall not be admitted to show or negate the *capacity* to form any mental state" but is "admissible solely on the issue of whether or not the accused *actually formed* a required specific intent." § 28(a) (emphasis added). Any expert in a criminal action "shall not testify as to whether the defendant had or did not have the required mental states" for the crimes charged. "The question as to whether the defendant had or did not have the required mental state shall be decided by the trier of fact." § 29. Evidence of voluntary intoxication is not admissible to negate the *capacity* to form any mental state, but is admissible "solely on the issue of whether or not the defendant *actually formed* a required specific intent." § 22 (emphasis added).

Garceau seeks to present expert testimony from Dr. Craig Haney and Dr. David Smith, Exhibits 48 and 50, as well as testimony from percipient witnesses,[24/] regarding his abuse of cocaine, symptoms of PTSD, and deteriorating mental condition. Dr. Smith observes, based on testimony provided by prosecution witnesses at trial, that Garceau smoked "significant amounts of cocaine over a period of years," commonly described as "acute toxicity with a pattern of chronic dependance." Ex. 50:6. Dr. Smith opines, based primarily on declarations by prosecution witnesses of Garceau's behavior, paranoia

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investigate and present evidence of drug abuse, and Claim S: trial court error in denying a voluntary intoxication instruction.

23. In addition, § 188 was amended to narrow the definition of "malice aforethought." The prior definition included an awareness of the obligation to act within the general body of laws regulating society, and the capacity to act in accordance with such awareness. The amendment provides that once the trier of fact finds a deliberate intention to unlawfully kill, no other mental state need be shown. *See People v. Saille*, 54 Cal. 3d 1103, 1113-14 (1991).

24. *See* footnote 12 above.

and hallucinations, that Garceau suffered from a "cocaine-induced toxic psychosis." *Id.*:12. A person suffering from this type of psychotic state may "respond inappropriately to events which occur solely within the psychotic or delusional mental state of the individual." *Id.*:12-13. As a consequence of a psychotic state resulting from cocaine dependence, an individual may have "significantly impaired judgment and planning capacities, and a state of paranoia that can result in behavioral responses to perceived occurrences that have no basis in reality," behaviors which may be "irrational[] and/or violent[]." *Id.*:13. Dr. Smith concludes Garceau's documented history of drug use reveals cocaine dependence and consumption of sufficient quantities to "severely impair his mental functioning." *Id.*:3. Dr. Haney agrees with Dr. Smith's conclusions, that "the crimes resulted from a cocaine-induced psychosis that included strong elements of paranoia." Ex. 48:21.

Garceau contends cocaine psychosis prevented him from forming the requisite intent to commit first degree murder. Garceau asserts he is entitled to habeas relief, as the new evidence would probably produce an acquittal. The inquiry on habeas is whether the expert testimony, if presented to the jury, would have substantially influenced the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. at 623; *California v. Roy*, 519 U.S. 2, 4-5 (1996) (the *Brecht* standard of substantial influence on the verdict, taken from *Kotteakos v. United States*, 328 U.S. 750 (1946), is applicable on federal habeas review to trial errors). Federal habeas relief is warranted when newly discovered evidence bears on the constitutionality of the conviction and would probably produce an acquittal. *Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993) (*citing Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Harris v. Vasquez*, 949 F.2d 1497, 1523 (9th Cir. 1990)).

The proffered expert testimony of the effects of Garceau's cocaine use does not make it probable he would have been acquitted. California juries have found defendants guilty of first degree murder and/or have imposed the death penalty after hearing testimony detailing the effects of cocaine psychosis. *See e.g., People v. Breaux*, 1 Cal. 4th 281, 303 (1991) (finding of first degree murder after evidence of cocaine psychosis and expert testimony that defendant's mental state was inconsistent with premeditation); *People v. Visciotti*, 2 Cal. 4th 1, 32 (1992) (defendant guilty of first degree murder after evidence of cocaine

psychosis was presented and expert testimony stated he did not premeditate or deliberate the crime); *People v. Horton*, 11 Cal. 4th 1068, 1086 (1995) (death sentence returned despite expert testimony on cocaine psychosis and the effects of freebasing cocaine).

It can be fairly inferred from the verdicts that the jury believed the testimony of Garceau's colleagues with whom he used, trafficked, and manufactured drugs. Whittington's testimony covered the evening before the murders, and indicated Garceau was able to question and analyze his actions. "[Garceau] asked me if I thought he was just paranoid." RT-XI:2779. From this, the jury could conclude Garceau was not so affected by cocaine that he was unable to examine and evaluate his motives and conduct, negating the inference that his actions and mental state had no basis in reality. Garceau killed to eliminate "snitches" who he believed were potential witnesses against him, who could cause him problems. Immediately after the murders, Garceau recognized the need to dispose of the bodies and to remove evidence linking him with Maureen's apartment. This conduct demonstrates cognition and understanding of the consequences both before and after he acted. Evidence showed Garceau abhorred "snitches," based on his chronic, violent, criminal lifestyle. Expert testimony about cocaine psychosis would have further emphasized Garceau's long standing involvement with drug use, drug manufacturing and trafficking, and weapons.

Garceau improperly seeks to offer juror testimony to show the slight impact drug use evidence had on their verdicts. *See* Exs. 53 and 56 (declarations of Jurors Briscoe and Gaines). Jurors may not testify as to the effect evidence has on their thought processes or how evidence influences deliberations. Fed. R. of Evid., Rule 606 (b); Calif. Evid. Code §§ 1150 and 1181. The proffered declarations cannot be considered in this proceeding. Claim B is denied on the merits.

Claim C - Denial of Psychiatric Assistance

Garceau asserts he was denied reasonably competent psychiatric assistance at trial. David Marlowe, Ph.D. was retained by defense counsel to examine Garceau. Garceau contends Dr. Marlow unreasonably failed to competently or reliably evaluate his mental state,

failed to interview family members, obtain social history information, interview percipient witnesses, perform independent psychological, neurological or toxicological tests, diagnose cocaine psychosis or PTSD, or do any follow-up consultation with experts in these areas.

The State responds Garceau's claim is conclusory and not factually specific. The record demonstrates trial counsel consulted with and retained a mental health expert. The State contends requiring a review of the competence of psychiatrists would constitute a new rule, barred under *Teague v. Lane*, 489 U.S. 288 (1989).

Due process requires a state to provide access to competent psychiatric assistance when a defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Garceau's trial counsel retained a psychologist to examine him. There is no evidence Garceau's access to psychiatric assistance was limited by the state or that the funding provided was insufficient. There was no credible ground for an insanity defense. Garceau's claim his psychologist was incompetent for not gathering background information is foreclosed by *Harris v. Vasquez*, 949 F.2d 1497, 1517-18 (9th Cir. 1990), which addresses the same claim raised here; refusing to expand *Ake* to encompass a "battle of experts." *Id.* (*citing Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)).[25/] Claim C fails to state a claim under *Ake* and is denied on the merits.

Claim D - False and Misleading Testimony of Susan Rambo and Wayne James

Garceau complains his conviction was obtained through the use of uncorrected false and misleading statements, known to the prosecution and made by key prosecution witnesses, which were of such significance to affect the outcome of the trial, rendering his death

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25. "Allowing such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." *Harris*, 929 F.2d at 1518.

sentence unreliable.

The first statement is Susan Rambo's, which allegedly deceived the jury into believing Susan received limited benefits for her testimony. Susan testified she did not have written immunity from Monterey County until the trial started. Garceau offers evidence that Susan's attorney, Bud Landreth, arranged a "no prosecution" agreement before she talked to the police and that Susan received other benefits which were not disclosed to the defense: she was kept in protective custody for one week, and the District Attorney's office intervened on her behalf in an investigation by Child Protective Services ("CPS").

Presentation of false evidence violates due process and requires a new trial. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). This is so even where the prosecution does not solicit the false information but only allows it to go uncorrected; *Napue v. Illinois*, 360 U.S. 264, 269 (1959), irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To justify a new trial, the false evidence must be material, i.e., reasonably likely to affect the judgment of the jury. *Id.* "The principal [underlying *Brady*] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady,* at 87.

There are two general claims under *Brady*: knowing use of perjured testimony, and failure to disclose exculpatory evidence. *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667, 678 (1985). The knowing use of perjured testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, at 103. This is equivalent to the *Chapman v. California*, 386 U.S. 18, 24 (1967) harmless error standard. *Bagley*, 473 U.S. at 679-80 n.9. *See also Napue v. Illinois*, 360 U.S. 264, 267 n.2 and 271-72 (1958) (finding the primary witness testified falsely, the prosecutor knew it, and the evidence was insufficient without the testimony; a new trial was required).

The failure to disclose exculpatory and impeachment evidence favorable to the defense is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a

probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1991). *Bagley* materiality is not a sufficiency of the evidence test. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434.

Garceau is incorrect that the immunity agreement was not completely disclosed. There is no doubt that everyone, the parties, the judge and the jury, knew that Susan had been given immunity in return for her testimony, both in Monterey County and in Kern County. The prosecutor elicited this fact on direct examination, RT-X:2602, and Garceau's trial lawyer emphasized it on cross-examination. *Id.*:2706. Both immunity agreements were marked for identification as People's Exhibit number 39. CT-5:1157-63, 1173. Other evidence was presented to the jury which negatively impacted Susan's credibility. She admitted during her testimony to involvement with drug manufacturing, RT-X:2571-72, to filing a missing person's report after she was told her husband had been killed, RT-XI:2681, to allowing friends to hire an airplane and search the mountains for Greg, *id.*:2686, to calling Greg's answering machine several times (after she had gone to the house and turned the machine on) so friends would think she was looking for him, *id.*:2687-88, to having sex with Garceau, *id.*:2691, to using drugs, *id.*:2691-92, and to purchasing guns for Garceau, an admitted felon. *Id.*:2714.

Even assuming the truth of the assertions that Susan was in protective custody and that the District Attorney's office intervened for her in a CPS matter, such evidence, if it had been presented, was cumulative and unnecessary to further prove Susan was a cooperating, immunized witness who feared Garceau, received help from the prosecutor, and had made prior false statements. The jury had more than sufficient evidence to fairly judge Susan's credibility without the additional evidence Garceau offers. The results of the trial would not have been different if such evidence had been provided the jury. Evidence of substantial government benefits to Susan and her cooperating status were before the jury. No prejudicial error occurred which would have substantially influenced the jury's verdict. *Brecht*, 507 U.S. at 623.

The second statement is from Wayne James, described as a "last minute" witness. Garceau contends James testified falsely he had not been in Bakersfield for eleven months before his appearance at trial, because he was arrested on a gun charge in Bakersfield in January 1987. James testified he first talked to the prosecutor the day he arrived in Bakersfield from Las Vegas, one day before his testimony, and that the last time he was in Bakersfield was in June of 1986. RT-XII:3202-03. The exhibits Garceau submits show the charges associated with James's January 1987 arrest were dismissed. Exs. 46:4, 47:2. They do not prove James was in Kern County during January of 1987 for any longer than the day he was arrested.

Garceau does not indicate how or why the prosecution knew James's testimony was false. The disclosure requirement of *Brady* and its progeny obliges the prosecution to learn of any exculpatory evidence known to others acting on the government's behalf, which includes law enforcement personnel. *Kyles v. Whitley*, 514 U.S. 419, 436-38 (1995). The same standard is not specifically extended to impeaching testimony.

The alleged undisclosed evidence goes only to collateral impeachment of James's credibility, and is not material to either guilt or penalty as required by *Brady*. 373 U.S. at 87. Even assuming the prosecutor should have known of James's January 1987 arrest and corrected his testimony about not being in Kern County before the trial, the evidence is inconsequential to the jury's judgment. The jury had more than sufficient evidence to judge James's credibility. James admitted he manufactured drugs with Garceau, RT-XII:3185; he sold and used drugs, *id.*:3186, 3188-89; and he was well-known by Kern County law enforcement under the moniker, "Fast Lane Wayne." *Id.*:3194. James testified he was "in shock" when he heard of Rambo's murder, but had a cavalier attitude about the murders of Maureen and Telesforo. *Id.*:3185 ("since Maureen was going to snitch on [Garceau], he did what he had to do"). Such adverse evidence about James bolsters confidence in the verdict. No error occurred which would have substantially influenced the jury's verdict. *Brecht*, 507 U.S. at 623. Claim D is denied on the merits.

Claims E, F, and G - Excessive Security and Presence of

Television Crews

Claim E contends Garceau's shackles and handcuffs at the preliminary hearing impaired his ability to assist counsel, and the heightened security measures at trial unfairly conveyed an impression of dangerousness and guilt which prejudicially influenced the jury. The specific actions referenced are: the use of metal detectors for witnesses and the audience; the presence of three uniformed guards in the courtroom in addition to the bailiff; the presence of plainclothes officers; the presence of a guard with a metal detector during voir dire; and subjecting prospective witnesses to pat-down searches. Garceau contends these actions unfairly conveyed the impression he was dangerous and presumptively guilty, and were based in part on the assertion he was a member of the Hell's Angels motorcycle group.

The State rejoins Garceau has provided no evidence his communication with counsel was impaired by his restraints at the preliminary hearing. The claim lacks factual support and no prejudice is shown. The sheriff submitted evidence to support the additional security during the preliminary proceedings approved by the trial judge. RT-1:25-58, 74-76 (1986 proceedings); RT-2: 54-56. The State alleges the security measures were reasonable, unobtrusive and appropriate.

Juror declarations submitted in support of this claim do not show the security measures were excessive. Juror Briscoe observed the bailiffs appeared to be wearing "flack jackets" when Nash testified. Ex. 53. Juror Gaines saw Whittington outside the courtroom in shackles. Ex. 56.[26] Unjustified shackling impacts a defendant's constitutional rights when viewed by the jury, by "creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy." *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999) (*citing Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)). Where the jury did not see the shackles, any error may be harmless. *Rhoden, id.* Garceau's shackles at the preliminary hearing could not have prejudiced

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26. Juror Kalar stated he saw Garceau in court in shackles, but this observation is not supported by the evidence. Ex. 58.

him; no jurors were present. Most prisoners in state and federal trial courts are shackled during pre-trial court appearances. Garceau does not specify how shackles at the preliminary hearing kept him from communicating with his attorney or what information he was unable to impart to counsel. There is no evidence his constitutional right to assistance of counsel was impaired by pre-trial shackles.

A federal court reviewing a claim of excessive security can only look at the scene to determine whether it was inherently prejudicial so as to impact a defendant's right to a fair trial. *Holbrook*, 475 U.S. at 572. The presence of guards can cause reasonable inferences other than the defendant was dangerous or culpable. *Id.* at 569. "Our society has become inured to the presence of armed guards in most public places." *Id. See Ainsworth v. Calderon*, 138 F.3d 787, 797, amended on other grounds by 152 F.3d 1223 (9th Cir. 1998) (six deputies, two at the courtroom entrance and two for each defendant were not inherently prejudicial); *King v. Rowland*, 977 F.2d 1354, 1358 (9th Cir. 1992) (upholding three armed guards for a single defendant); *Morgan v. Aispuro*, 946 F.2d 1462, 1465 (9th Cir. 1991) (security measures are common in government buildings, measures here did not restrain or separate the defendant, no reason for the jury to infer the defendant was the specific reason for the security).

Garceau does not show how the security measures employed at his trial were inherently or actually prejudicial. The trial judge limited uniformed, armed guards to three plus the bailiff, instructed that any additional officers be in plainclothes in the audience or outside the courtroom, and stated Garceau was not to be handcuffed or shackled in the presence of the jury. RT-2:54-56. The judge also took steps to physically separate the jury, thus insulating them from the security procedures. *Id.* There is no indication the jury's view of Garceau was negatively impacted by the additional security. Even assuming the security measures negatively impacted the jury, any error was harmless considering the overwhelming evidence of Garceau's guilt, and that he and trial witnesses were security risks. Claim E is denied on the merits.

Claim F alleges the presence of television cameras in the courtroom during the testimony of certain witnesses violated Garceau's constitutional rights. Witness Patricia Shepard, when asked to show how Garceau demonstrated stabbing the victims, asked, "The cameras

have to be here?" RT- 2509. Trial counsel requested the television crews be prevented from entering and exiting the courtroom during the examination of witnesses to prevent the appearance of editorializing for the jury. RT-2441-42. This request was denied. RT-2442. Further, Garceau asserts the judge failed to stop conferences and interviews by the television crews, after trial counsel advised this was occurring in the hallway, and did not inquire about any resulting impact on the jury. RT-2527.

The State rejoins that Ms. Shepard testified in front of the television cameras without concern or hesitation until she was asked to re-enact Garceau's depiction of stabbing Maureen and Telesforo. The State opines her request not to be on camera arose from sensitivity about re-enacting the scene, not from any feeling of intrusiveness. The State contends the trial judge did ask the jurors if they had inadvertently heard or read anything about the case after defense counsel complained of television interviews being conducted in the hallway. Only one juror related an incident at her job. No juror mentioned any exposure to the media presence at the courthouse. The State argues Garceau has failed to show prejudice from the presence of the television crews.

Sheppard v. Maxwell, 384 U.S. 333 (1966) held that due process requires "trial by an impartial jury free from outside influences. . . . [but] there is nothing that proscribes the press from reporting events that transpire in the courtroom." At 362-63. Sheppard's conviction was reversed, prejudice was presumed from pervasive media interference during the trial, which among other things, impaired his communication with counsel when reporters were seated inside the bar; reporters repeatedly revealed evidence detrimental to Sheppard which was never presented at trial; reporters invaded the courthouse so that "bedlam reigned" and the participants in the trial were continually hounded; jurors' names, addresses and pictures were published before the trial, turning them into celebrities. The judge made no attempt to control the media's influence at Sheppard's trial, did not admonish the jury not to read or listen to news reports, refused to question jurors about several inflammatory news reports, and ignored the impact of the media's takeover of the court facility. Nothing in Garceau's trial comes close to the "carnival atmosphere" decried in *Sheppard*. Garceau has not presented evidence that his jury was improperly influenced by media

coverage at his trial. Claim F is denied on the merits.

Claim G contends the increased security measures and intensified media presence during the testimony of Eddie Nash and Judge Ronald Coen conveyed an importance to the jury which was false and prejudicial. Mr. Simrin declares the testimonies of Nash and Judge Coen were accompanied by a significant increase in security and by frenzied media activity, including the presence of television cameras. Ex. 49:5. Mr. Simrin asserts Nash and Judge Coen entered the courtroom surrounded by guards, and the audience increased from about two people per day[27] to a packed courtroom. *Id.* Juror Briscoe declares he disregarded Nash's testimony, which denied association with Garceau or Maureen, because the judge admonished Nash several times. Ex. 53. Juror Gaines states Garceau's conviction was based on some connection between Garceau and Nash, however, he declares the information presented about Nash seemed irrelevant. Ex. 56. Juror Kalar declares he believed there was a connection between Nash and Garceau, based on the testimony of the co-conspirators. Ex. 58. These juror statements are improper and cannot be considered under federal or state evidence law.

Garceau argues additional media attention and heightened security unduly emphasized the testimony of Nash and Judge Coen. This ignores the testimonies of Larry Tom Whittington, Susan Rambo, and Michele Christie, all of whom described the association between Garceau and Nash. *See* RT-XI:2778-80 (Whittington); RT-X:2593, RT-XI-2627, 2661, 2713 (Susan); RT-XII:3002-04 (Ms. Christie). As in Claim A(1) above, there is no prejudice since there was sufficient evidence upon which the jury could find a connection between Nash and Garceau, despite Nash's denials. Claim G is denied on the merits.

Claim H - Discriminatory Use of Peremptory Challenges

Garceau seeks to present evidence that at the time of his trial the Kern County District Attorney's office had a pattern and practice of

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27. The absence of an audience during the majority of the trial belies the claim of inordinate media attention and publicity.

using peremptory challenges against Hispanics.

Garceau argues there was prima facie *Batson*[28] error and the prosecutor's explanations for challenges were contrived to conceal discrimination. The trial judge found no prima facie *Batson* error because Hispanic men and non-Hispanic women remained on the jury, which impliedly fails to recognize Hispanic women as a separately cognizable group.[29]

Garceau's first *Batson* challenge claimed wrongful exercise of five of the prosecution's first twelve peremptory challenges to excuse women with Hispanic surnames. RT-X:2250. The court found three Hispanic males and one Hispanic female remained on the panel, and ruled Garceau had not shown a prima facie case. *Id.*:2252-54. The trial judge reviewed transcripts and held he was "not of the opinion that the district attorney has systematically excluded a minority from the jury." *Id.*:2254. Immediately following the denial of the motion, the prosecutor exercised the next peremptory challenge against the remaining Hispanic female on the jury. RT-X:2254. Garceau renewed his motion. *Id.*:2255. The court ruled that because four Hispanic males and five non-Hispanic females remained on the panel, "it does not appear . . . that a prima facie case of discrimination has been shown," *id.*, and denied Garceau's motion. *Id.*:2256. The following day, the prosecutor requested and was allowed the opportunity to put on the record the reasons for exercising peremptory challenges to the Hispanic women in the jury box. *Id.* at 2284-93. Garceau complains about the

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28. *See Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 280 (1978). *See also Powers v. Ohio*, 499 U.S. 400, 409, 415 (1991) (holding a defendant who is not a member of the minority class may still assert a *Batson* equal protection challenge).

29. This finding, and the prosecutor's subsequent explanation, are subject to deference on review, as they are based on facts that play out in front of the trial judge. *Tolbert v. Page*, ___ F.3d ___, 1999 WL 427449 (9th Cir. June 28, 1999) (en banc).

prima facie *Batson* error ruling, and calls the prosecutor's explanations belatedly contrived to cover up discriminatory strikes. The record reveals support for the prosecutor's explanations. The trial judge stated that even if the ruling about prima facie *Batson* error was wrong, the prosecutor's explanations were persuasive. *Id.*:2294.

Garceau contends the California Supreme Court found that Hispanic women qualify as a cognizable group. *See People v. Garceau*, 6 Cal. 4th 140 (1993). This is incorrect. "[W]e assume that defendant is correct in asserting, without challenge by the People, that Hispanic-surnamed women constitute a 'cognizable group' under *Wheeler*." *Id.* at 171 (emphasis added). The California Supreme Court, after reviewing the entire voir dire record, found Garceau had "failed to show a 'strong likelihood' that these prospective jurors were excluded because of group association." *Id.*

1. Did the Trial Court Err in Finding No Prima Facie Case Regarding Hispanic Women?

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995), involves a similar challenge. Turner, an African-American defendant, argued the prosecution violated *Batson* by using five out of nine peremptory challenges to exclude African-Americans (three men and two women) from the jury. At the time of Turner's motion, four African-American women remained on the jury. The trial judge found no "pattern of individualized discrimination." *Id.* at 811.

> "Because African-American women remained on the jury, Turner focuses on the exclusion of black men as the basis for a *Batson* violation. However, neither the Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males,' may establish a cognizable group for *Batson* purposes. *See United States v. Changco*, 1 F.3d 837, 839 (9th Cir. 1993) (declining to address whether 'minority women' are an identifiable class). In fact, the two circuits that have addressed this issue have held that a defendant may not seek *Batson* relief on the basis of

> exclusion of 'black men' or 'black women.' *See United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991); *United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986)."

Id. at 812. Here, the ruling that Hispanic women were not a separately cognizable group to support *Batson* error did not violate Garceau's federal constitutional rights.

2. Were the Challenges Sufficient to Show Discrimination of Hispanics in General?

"Regardless of the final racial makeup of the jury, the exclusion of a single minority juror on account of race would constitute a *Batson* violation." *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992). In *Turner*, the exclusion of African-Americans as a group raised an inference of discrimination, since five of a possible nine African-American venire-persons could establish a pattern of discrimination. *Id.* at 812-13. *Turner* considered the percentage of strikes compared to the venire composition. An inference of discrimination is raised when the percentage of challenges against minorities is disproportionately higher than the percentage of the minority in the venire. In *Turner*, the venire was composed of approximately 30 percent African-Americans and the prosecution challenged 56 percent. *Id.* at 813.

Here, the venire (after excuse for hardship and cause) was 25.5% Hispanic (12 of 47). The prosecution peremptorily challenged 19 persons, 5 (26.3%) of whom were Hispanic women. The defense peremptorily challenged 12 persons, 4 (33.3%) of whom were Hispanic men. The jury and alternates selected contained 3 Hispanic men. The percentage of Hispanics challenged by the prosecution compared to the total number available was only marginally higher.

Turner considered whether all of the challenged group had been excused from the venire: "The fact that the prosecutor did not attempt to remove all African-American jurors weighs against Turner's claim, but it is not dispositive." *Id.* "[T]he state trial judge may have impermissibly relied on the fact that African-Americans and other

minorities remained on the jury, without considering other factors." *Id.* at 814. Here, that Hispanics remained on the jury is not dispositive.

The record in *Turner* did not show the judge considered the prosecutor's questions and statements during voir dire, the venire-persons' responses, or any other factors. *See United States v. Battle*, 836 F. 2d 1084, 1085 (8th Cir. 1987) (noting all relevant circumstances should be considered, including a pattern of strikes, questions and statements by prosecutor during voir dire). *Turner* found no bias in the prosecutor's questions.

Here, the prosecutor excused potential jurors Najera and Chavez, both of whom indicated tacit approval of drug use, while no other potential juror held similar views. RT-VI:1028 (Najera), RT-VII:1519-21 (Chavez). Juror Briscoe's ex-husband used drugs, but not until after they were divorced. RT-V:825. Juror Puckett gave up on his marriage because of his wife's drug use. *Id.*:803-04.

The prosecutor also excused potential jurors Asuncion and Martinez, who were confused during voir dire questioning. Mrs. Asuncion had difficulty with the concepts of reasonable doubt and credibility. RT-VIII:1669-71, 1690-91. She would require the prosecutor to prove the case totally so there were no "maybes." *Id.*:1666. Later she explained "maybe" was something tied to the evidence. *Id.*:1691. Ms. Martinez's responses were inconsistent and confused. RT-VII:1446, 1448-49, 1456. First she said death was appropriate for "brutal crimes," *id.*:1446, then that she thought life without parole was preferable to death but could not say why she thought so, *id.*:1447, then defined all first degree murder as "brutal." *Id.*:1454-56. Juror Munoz, by comparison, was confused by confusingly framed questions. *Id.*:1416-17, 1425-26, 1433-36. Juror Bittle became confused by trying to answer before the entire question was asked. RT-IX:2228-29, 2240-42.

Potential juror Vasquez was excused for her continued attempts to obtain a hardship release. First, during hardship examination, she stated there was no substitute available for her position at work, that her students would suffer in her absence, and that her husband was on disability. RT-III:213-18. During questioning on death qualification and for cause, she stated she was enrolled in a computer class that had started the previous Wednesday which would continue for 4 more weeks at 3:00

p.m., and was in a bilingual education class on Tuesdays at 3:00 p.m. that would extend until June. RT-IV:360-96. Her hardship claims were denied, she was passed for cause and seated on the panel at No. 12. RT-VI:1228. More than 3 weeks later she submitted a hardship letter from her employer and complained of problems transporting her daughter from home to school. RT-X:2249. By comparison, Juror Gaines stated during hardship questioning that the 130-mile round trip from home would be a burden; RT-III:129-30, on recall stated his employer would be in a bind if he was chosen; *id.*:204-05, but during questioning on death qualification and for cause made no further attempt to be excused. RT-VIII:1737-1760. The reasons given by the prosecutor for peremptory challenges, especially in light of Ms. Vasquez's extreme efforts to avoid service, are non-discriminatory, valid and fully supported by the record.

Garceau claims the Kern County District Attorney's office practiced discriminatory challenges on the basis of race and gender in violation of the Equal Protection Clause of the Fourteenth Amendment. Garceau offers the belated opinion of trial counsel, Mr. Simrin, based on his twenty-five years of criminal defense work in Kern County. Mr. Simrin opines the reasons offered by the prosecutor for the peremptory challenges were an attempt to cover up bias based upon race and gender and that this was a "well-established practice based on unfounded assumptions, stereotypes, and discriminatory attitudes of other parts of the community, including the staffing of the District Attorney's office." *See* Exs. 49 and 27. There is no excuse for the delay in raising this claim.

Garceau also seeks to call David Rivera, Esq., Kern County Deputy Public Defender from October 3, 1983 to March 16, 1990, and H. A. Sala, Esq., a criminal defense lawyer in Kern County from 1984, who will testify similarly to Mr. Simrin. *See* Exs. 64 and 65. Mr. Sala accuses the Kern County District Attorney's office of engaging in a conscious and planned strategy to strike jurors based on race. *See* Ex. 65. Garceau also seeks to present testimony from two of the challenged jurors, Asuncion and Vasquez, that they have served on other juries and "denying" the prosecutor's reasons for excusing them. *See* Exs. 51 and 69.

The state record shows there were valid, nondiscriminatory

reasons for the peremptory challenges exercised by the prosecution. The opinions of Mr. Simrin, Mr. Rivera and Mr. Sala are untimely, partisan subjective views, not easily corroborated fifteen years later, which should have been presented in the trial court. Mr. Simrin made no objection to the panel generally, nor did he file a pretrial motion to challenge the District Attorney's alleged biased jury selection practices to seek the judge's intervention in limine during jury selection. No published court decisions, empirical studies, or statistics of the racial composition of Kern County jury panels, trial juries or jury selection practices are offered. Even if such alleged discriminatory jury selection practices existed in the Kern County District Attorney's office, no objective evidence shows it impacted Garceau's trial.

The testimony of the potential jurors, Mrs. Asuncion and Mrs. Vasquez, is inadmissable. Their speculation about the prosecutor's reasons for excusing them from service, does not negate credible and lawful reasons offered, which are supported by the record. Under *Batson*, once a lawful reason for a challenge is offered and accepted by the trial judge, the inquiry as to the specific juror ends. *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir. 1999) (*Batson* does not require specific findings by the trial judge and only requires the prosecutor's explanation to be facially valid, not persuasive or even plausible). Attempts to offer post hoc explanations of their voir dire responses years later in no way undermines the validity of the prosecutor's interpretation and perception of the jurors' answers at the time. Claim H is denied on the merits.

Claim I - Improper Cause Exclusion of Anti-Death Prospective Juror

Garceau asserts he was denied his right to an impartial jury under *Wainwright v. Witt*, 469 U.S. 412 (1985), when potential juror Cathy Wilken was excluded for cause on the ground she was opposed to the death penalty. Garceau asserts Ms. Wilken's responses did not indicate inability to serve, but instead evidenced her understanding of the gravity of the determination she would be asked to make. Garceau claims Ms. Wilken was not questioned as to whether her feelings would affect her ability to follow the law, and that she implied she could vote for death

for compelling reasons.

The State responds Ms. Wilken was properly excused under *Witt* as her views substantially impaired her ability to serve due to her bias against the death penalty, which would influence her judgment. She did not think she could impose a death sentence. The State acknowledges Ms. Wilken's responses did not make it unmistakably clear she could never impose a death sentence, but "unmistakable clarity" need not be shown. *People v. Guzman*, 45 Cal. 3d 915, 956 (1988). The trial judge was in the best position to evaluate Ms. Wilken's demeanor and her answers on voir dire. Under *Witt*, prospective jurors may be excluded for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as a juror in accordance with the instructions and their oath. 469 U.S. at 424. The trial judge's finding regarding a potential juror's state of mind is a finding of fact subject to the presumption of correctness in 28 U.S.C. § 2254(d). *Id.* at 428-29.

The record shows the dismissal of Ms. Wilken was not an abuse of discretion. Ms. Wilken's lack of certainty that the death penalty was ever appropriate, combined with her admitted bias against the death penalty "that would influence [her] judgment," RT-IX:2067, sufficiently supports the judge's finding she would be unable to perform her duties as a juror as required by *Witt*. The California Supreme Court, on direct review, agreed the trial judge's finding was supported by the record. *People v. Garceau*, 6 Cal. 4th 140, 175 (1993). Garceau has not rebutted the presumption of correctness given the trial judge's finding. Claim I is denied on the merits.

Claim J - Cumulative Error in Jury Selection

Garceau argues the cumulative effect of errors asserted in Claims H and I denied him an impartial jury under *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). In *Gray*, a juror stated twice that she could impose the death penalty, but was excluded for cause. Her exclusion could not be harmless error, as an impartial jury goes to the integrity of the legal system. *Id.* at 668. Here, the excluded juror was unable to say she could impose the death penalty, and in fact admitted her bias against the penalty would influence her decision. The record discloses valid,

nondiscriminatory reasons for peremptory challenges exercised to strike certain Hispanic women on the panel. Garceau was not deprived of an impartial jury. Neither Claim H nor Claim I have any merit; there is no cumulative error. The California Supreme Court found no such error. *Garceau*, 6 Cal. 4th at 175. Claim J is denied on the merits.

Claim K - Erroneous Denial of Section 352 Motion

Garceau challenges denial of his motion to exclude or strike the testimony of Nash, Officer Sylvester, Judge Coen and Ms. Christie as irrelevant under Cal. Evid. Code § 210, or unduly prejudicial under § 352, violated his constitutional rights. Garceau alleges Nash's testimony about prior criminal acts and testimony about Nash's reputation for violence and criminal activity from Officer Sylvester and Judge Coen rendered the trial fundamentally unfair. Nash testified he did not know Garceau, Maureen or Ms. Christie, which he affirms in a current declaration. Garceau characterizes Ms. Christie's testimony, that she previously saw Garceau and Maureen at Nash's house, as unreliable due to her drug use.

Garceau argues absence of a connection between him and Nash makes the challenged testimony inadmissable to prove motive or state of mind and that the testimony invited jury speculation: (1) that some association existed in the past and continued; (2) that Garceau was afraid of Nash; (3) that Garceau had some reason to fear a violent reprisal from Nash; and (4) that Maureen was killed to prevent such an eventuality, because no direct evidence supported these assumptions. The challenged testimony is said not to corroborate Whittington's testimony that Garceau said Maureen was going to "snitch," or tried to call Nash's lawyer or a prosecutor. Garceau recognizes Ms. Christie's testimony corroborates Whittington's testimony that Garceau said Maureen used to "run with" Nash. This testimony, in conjunction with the heightened security measures, Claims F and G, is said to have resulted in a penalty based on emotion and guilt by association.

Garceau complains the trial court's failure to document findings on the Section 352 motion abused discretion, because the challenged testimony impacted the jury and "imbued the proceedings with a heightened aura of lurid underworld crime." Garceau describes the testimony as inflammatory and irrelevant circumstantial evidence presented by witnesses who "admittedly gave perjured testimony" at

previous hearings, lied to law enforcement, and harbored as compelling a reason to murder the victim as Garceau.

The State rejoins that the challenged testimony was relevant to motive and corroboration; any prejudice was cured by the limiting instruction given; and the challenged testimony was mitigating. The State argues the trial judge weighed and properly rejected defense counsel's arguments on the issue of probative value versus prejudice.

"While a petitioner for federal habeas relief may not challenge the application of state evidentiary rules, he is entitled to relief if the evidentiary decision created an absence of fundamental fairness that 'fatally infected the trial.'" *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 897 (9th Cir. 1996), *citing Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986). A petitioner must overcome the presumption of correctness due the trial court's finding the evidence was probative and not unduly prejudicial. *Id.*, citing 28 U.S.C. § 2254(d).

Federal courts have no authority to review claims that a state's evidentiary rules were violated, but can only determine if the admission of evidence rendered the trial so fundamentally unfair as to violate due process. *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *Reiger v. Christensen*, 789 F.2d 1425, 1430 (9th Cir. 1986). Even if evidence was admitted in violation of a state rule of evidence, due process is not violated unless the evidence is "of such quality as necessarily prevents a fair trial." *Windham*, 163 F.3d at 1103 (*citing Kealohapauole*, 800 F.2d at 1465).

The California Supreme Court found the challenged testimony entirely relevant to Garceau's motive for killing Maureen and Telesforo. *See Garceau*, 6 Cal. 4th at 177. Any prejudice from the challenged testimony was avoided by the trial court's limiting instruction to the jury. *Id.* at 178-79. The trial judge's failure to make a more specific finding regarding Garceau's Section 352 motion is a matter of state law and in no way impacts the fairness of the trial. The challenged evidence presented a classic credibility conflict as to each witness, which the jury resolved. The testimony directly bore on Garceau's unmitigated criminality, permeated with his continuous involvement in drug use, manufacture and trafficking, weapons, and violence. Claim K is denied on the merits.

Claim L - Erroneous Admission of Garceau's Statement

Garceau asserts his statement to the Monterey County District Attorney Investigator, Richard Lee, should not have been admitted. When Lee told Garceau he would first be sent to Kern County for trial, Garceau responded, "That was a stupid thing to do . . . they can only gas me once. They can only take my wheels one time. Do you know what I mean?" RT-XII:3352. Lee said, "Come on, Bob, that's negative vibes." *Id.* Garceau said, "Yeah, negative vibes, that's right. They can only – I'm still breathing and there's a few people who ain't." *Id.*

Garceau contends Lee's testimony was inadmissable hearsay, or arguendo, if an admission, irrelevant, because his statements were ambiguous, only acknowledging others were dead. Garceau perceives a substantial risk that the guilt and penalty verdicts were based on the unreasonable inference his statements to Lee were confessions.

The State notes failure to object at trial means the claim was not preserved. Garceau's statements were admissible as evidence of consciousness of guilt, without invoking a hearsay exception for the truth of the matter asserted; i.e., the statements were not offered to prove people were dead, but rather admitted culpable recognition of the magnitude of his crimes. The State contends only a guilty person would resort to such morbid sarcasm while incarcerated for murder.

The California Supreme Court found Garceau's statements to Lee were not hearsay, were not offered for their truth, but as evidence showing consciousness of guilt. The statements also reflected Garceau's callous disregard for human life, his malignant heart, and his disdain for the justice system. The admission of Garceau's statements to Lee did not violate due process as the evidence was not "of such quality as necessarily prevents a fair trial." *Windham*, 163 F.3d at 1103. Claim L is denied on the merits.

Claim M - Erroneous Admission of Highly Inflammatory Evidence

Garceau describes two photographs, four tissue samples and Maureen's upper and lower jawbone as highly inflammatory evidence which denied him a fair trial. The photographs, People's Exs. 5 and 19,

showed the decomposing bodies as they were removed from the dresser and Maureen's chest with decomposing bone matter.

Garceau argues the evidence, (1) was not relevant to any issue in the case, as the issue concerning the manner of death was not in dispute, (2) was highly prejudicial and inflammatory, (3) was cumulative, and (4) if relevant, should have been excluded as more prejudicial than probative. Garceau suggests the sole purpose for the photographs was to appeal to emotion.

The State responds that contemporary jurors are sophisticated, inured by media coverage of gruesome and shocking events, and desensitized to cruel and unusual homicides. "The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. The supposed influence on jurors of allegedly gruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality." *People v. Lang*, 39 Cal. App. 3d 680, 689 (1974), *cited with approval by People v. Jackson*, 28 Cal. 3d 264, 302 (1980).

The photographs were not unduly gruesome, showed the circumstances of the crime, and corroborated Whittington's testimony about disposal of the bodies and the force used to place Maureen's body into the dresser. *United States v. Goseyun*, 789 F.2d 1386, 1387 (9th Cir. 1986) (no error in admitting photographs of massive head injuries, photographs were admissible on the cause of death and the willful, deliberate and premeditated nature of the injuries). The State argues the photo of the wound to Maureen's sternum was not gruesome and bloody, and was relevant to depict the blows and the amount of force used. *Id.* (photographs which disclose the manner in which a victim was wounded are properly admitted on the issue of malice). The State argues the jawbone wound, People's Ex. 2, was not discernable in a two-dimensional photograph and was relevant to malice and identity. The tissue samples were also relevant to identify the victims. *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991) (evidence probative of an element may be introduced whether or not that element is specifically contested by the defense).

"We cannot disturb the state trial court's admission of the videotape recording on due process grounds in a habeas proceeding unless the admission of the photographs rendered the trial fundamentally

unfair." *Kealohapauole*, 800 F.2d at 1466, (*citing Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir. 1982)). "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." *People v. Crittenden*, 9 Cal. 4th 83, 133 (1994) (prosecution not obligated to rely solely on testimony or accept an antiseptic stipulation); *People v. Wilson*, 3 Cal. 4th 926, 938 (1992) (rejecting argument that evidence was cumulative); *People v. Price*, 1 Cal. 4th 324, 441, (1991) (trial court has broad discretion to admit photos of murder victim). "The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect." *Crittenden, id.*; *Wilson, id.*; *People v. Mickey*, 54 Cal. 3d 612, 655-656 (1991); *People v. Sanders*, 51 Cal. 3d 471, 514 (1990); *People v. Mason*, 52 Cal. 3d 909, 944 (1991).

The California Supreme Court decided the same claim. It found the evidence highly probative because it was "supportive of the prosecution's theory that the victims had been brutally murdered." *Garceau*, 6 Cal. 4th at 180-81. It also bore on issues of malice, premeditation, and Garceau's actions to conceal the bodies. *Id.* The photograph showed the positions of the bodies in the dresser, corroborating Whittington's testimony of the means of concealment. *Id.* at 181. The photograph of Maureen's sternum established that Garceau used different degrees of force during the fatal attack, which was relevant to the question of malice. *Id.* The tissue samples were not readily identifiable as human tissue, and supported the theory that the victims were killed in Shepard's apartment and then transported to Shandon. *Id.* The jawbone revealed Maureen was stabbed with sufficient force to penetrate completely through the bone, strongly suggesting Garceau acted with malice. *Id.* "[T]he trial court did not abuse its discretion in admitting the challenged physical evidence," the record supported finding that the photos' probative value to corroborate the prosecution's theory of the case outweighed prejudice, nor was the prosecutor required to accept the defense stipulation, which did not effectively explain the physical condition of the bodies. *Id.* at 182.

The presumption of correctness given the state court findings has not been rebutted. Admission of the challenged evidence did not render the trial fundamentally unfair. Claim M is denied on the merits.

Claim N - Insufficient Evidence: Uncorroborated Accomplice Testimony

On direct appeal, Garceau was granted $2,100 to investigate whether the prosecution withheld evidence that witnesses had been promised benefits in return for their testimony.[30] The investigation disclosed Wayne James, the only witness Garceau alleges the prosecution presented as not involved in the Shandon drug conspiracy, was arrested with Whittington in 1990 for a narcotics violation in Illinois.

Garceau claims this fact is significant because the majority of the testimony linking him with the murders came from members of the drug conspiracy, while Wayne James supplied the corroborating evidence required for the conviction. Garceau maintains the connection between James, the only allegedly independent witness, and Whittington, the leader of the conspiracy, indicates all the evidence against him was from co-conspirators.

The State responds that Whittington, Shepard and Susan Rambo were accessories to the murders by assisting in concealing the bodies and cleaning the crime scene, but the evidence was insufficient to find them accomplices in the murders. The trial court ruled that whether the killings were committed in furtherance of a drug conspiracy was a factual determination for the jury. The State argues that even if all witnesses whose testimony inculpated Garceau were found to be accomplices, the evidence was sufficient to corroborate their testimony.

The California Supreme Court recognized that for a witness to be "an accomplice as a matter of law, the record must establish, . . . either the witness aided and abetted defendant in committing the killings" or conspired with a person who harbored intent to commit the offense which was the object of the conspiracy. *Garceau*, 6 Cal. 4th at 183 (emphasis added). The Supreme Court concluded the trial evidence did not establish either theory. *Id.* At most, Shepard, Whittington and Susan were accessories. "No evidence connected these witnesses (or anyone else) to the actual killings. . . . The aiding and abetting theory therefore

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30. The total amount requested was $2,350.

fails for lack of evidence that any of the prosecution's witnesses assisted defendant in committing the killings." *Id.* Even though the state court found the key witnesses were part of a drug conspiracy, the killing of Maureen and Telesforo was not the object of that conspiracy, nor committed in furtherance of the drug conspiracy. *Id.* at 183-84.

James's association with Whittington occurred after the murders and the trial. No evidence of prior business association between James and Whittington was offered. Even if such evidence existed, the jury had substantial evidence to determine James was not an accomplice or co-conspirator. The credibility of the defense theory was for the jury to determine. It did so. Substantial evidence supports the jury's determination that the murders of Maureen and Telesforo were not in furtherance of the drug conspiracy. No corroborating evidence is necessary as the key prosecution witnesses were not accomplices to the murders. Claim N is denied on the merits.

Claims O, P, Q, R - Instructional Error

Generally, errors of state law are not cognizable on federal habeas. If a challenged instruction, viewed in the context of the overall charge, shows a denial of due process which renders the trial unfair, habeas relief may lie. *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1976). A claim that instructional error violates a defendant's constitutional rights depends on the evidence and the overall instructions. *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997); *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995).

Claim O is that the failure to limit the use of other crimes evidence, specifically of Greg's murder and Garceau's use, manufacture and sale of drugs, allowed the jury to consider the evidence for any purpose, especially as evidence of Garceau's bad character and propensity to commit the murders. Garceau argues the giving of the prosecution's Special Instruction 3, instead of the modified CALJIC 2.50 requested by the defense, told the jury they could consider the other crimes evidence to show Garceau's bad character. He asserts the case was based on circumstantial evidence, and turned on the believability of purportedly unreliable prosecution witnesses. This instruction permitted

the jury to use other crimes evidence to find guilt and to enable the prosecutor to give a prejudicial closing argument about the Rambo murder.

The California Supreme Court addressed Garceau's due process claim to the challenged other crimes instruction and found the trial court erred by giving an instruction which permitted other crimes evidence to be considered for any purpose, including Garceau's character and propensity to commit murder. *Garceau*, 6 Cal. 4th at 186. In light of the overwhelming evidence of Garceau's guilt, the challenged instruction was harmless error. *Id.* at 187. Garceau does not overcome the presumption of correctness of state court findings. Garceau now complains more evidence of his drug use and its effects should have been admitted. His relationship with Susan following the murder of Greg was relevant to her credibility. The erroneous instruction did not render the trial fundamentally unfair. Claim O is denied on the merits.

Claim P is that the trial court refused defense Special Instruction H (testimony may only be considered for a possible motive), and the use of Prosecution's Special Instruction 1 (testimony may not be used to determine bad character or disposition to commit crimes, but may be used for motive, identity, state of mind, corroboration of other evidence and credibility), failed to adequately define the limited admissibility of testimony by Nash, Officer Sylvester, Judge Coen and Ms. Christie.

The California Supreme Court, on direct review, addressed this due process claim and held Nash's and others' testimony was properly admitted to show motive, the killer's identity and state of mind, and corroborated other testimony. *Garceau*, 6 Cal. 4th at 195. Special Instruction 1 allowed the jury to consider the testimony for any of these valid limited purposes. *Id.* Garceau provides no evidence to overcome the presumption of correctness of state court findings. This instruction did not render the trial fundamentally unfair. Claim P is denied on the merits.

Claim Q is that the trial court erred by failing to give defense Special Instructions D (guiding instruction regarding reasonable doubt) and F (cautionary and guiding instructions regarding confessions). Garceau contends the refused instructions were "pinpoint instructions" to inform the jury of the significance of evidence in light of the defense theory and were appropriate to show the prosecutor bears the burden of

ultimate persuasion. The trial court refused the instructions on the ground they were argumentative. Instruction D was also refused as its effect would have had the court decide disputed jury issues and in effect directed the jury to make certain findings. Instruction F was also refused as duplicative. Garceau argues the refused instructions rendered his trial fundamentally unfair and prejudiced the penalty determination. The California Supreme Court held the special instructions were correctly refused as they were argumentative and duplicative of other instructions given. *Garceau*, 6 Cal. 4th at 192-94.

Garceau provides nothing to overcome the presumption of correctness given to the state court findings. A defendant is not entitled to argumentative or cumulative instructions on a subject already covered by instructions. Claim Q is denied on the merits.

Claim R is that the trial court's refusal of three instructions[31] requested by the defense and adoption of 20 instructions on the issue of accomplices and conspiracy, confused the jury and failed to adequately inform the jury of the appropriate standard to judge the testimony of the drug conspirators. The California Supreme held the standard instructions regarding accomplice liability were not confusing, the misreading of CALJIC Nos. 3.19 and 6.10.5 constituted harmless error, and it was not error to refuse the instructions requested by the defense. *Garceau*, 6 Cal. 4th at 188-91.

Garceau has not overcome the presumption of correctness given to the state court findings. The conspiracy and accomplice instructions correctly stated the law, and the defendant's "Matter of Law" instructions were not justified by the evidence. The instruction to examine the testimony of an informer with greater care than an ordinary witness was not required under state law, and was duplicative of credibility instructions that were given. Claim R is denied on the merits.

Claim S - Trial Court's Refusal of Voluntary Intoxication

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31. The defense requested CALJIC No. 3.16 (Accomplice as a Matter of Law), a Conspiracy as a Matter of Law instruction, and Special Instruction A (Testimony of an Informer).

Instruction

Garceau claims the evidence justified a voluntary intoxication instruction. He points to Whittington's testimony that Garceau was "paranoid" prior to the murders; Susan's description that the morning after the murders he was continuously freebasing cocaine, was nervous, jumpy, "hyper," and not coherent; and Codd's statement that he "became a different person," "couldn't think straight and was very paranoid" when he was freebasing. Garceau admits no witness testified to his use of cocaine immediately before the murders and there is no direct evidence of at what time on the day of the murders he began freebasing cocaine. He contends his known habit (that if he had cocaine he smoked it until it was gone) and the testimony that he was freebasing shortly after the killings, leads to an inference that he was freebasing prior to the murders.

The State asserts the trial court did not err in refusing the instruction, as the evidence at trial was insufficient to support the instruction. *See Garceau*, 6 Cal. 4th at 196-198. In *People v. Williams*, 45 Cal. 3d 1268 (1988), the California Supreme Court affirmed refusal of a voluntary intoxication instruction, where evidence supportive of the defense was minimal. *Id.* at 1311. The evidence in *Williams* was provided by an accomplice, present at the time of the murder, who stated Williams "was 'acting like he was on LSD' and was 'acting crazy,' i.e., 'making facial expressions, being kind of jumpy . . . [changing] the tone of his voice.'" *Id.*

Here, the evidence found insufficient for a voluntary intoxication jury instruction, RT-XIII:3609-12, was less direct and more remote from the murders than the evidence in *Williams*. Whittington, who saw Garceau just before the murders, made no comment about Garceau's behavior or mental state at that time. Garceau's interpretation of Whittington's testimony, that Whittington described Garceau as acting "paranoid," is misleading. It was Garceau who asked whether his concern about Maureen "snitching" was paranoid. Whittington merely agreed. Conversely, this exchange indicates Garceau was able to analyze his own behavior and thought process and to seek third-party verification. This undercuts the contention Garceau was too intoxicated to reflect upon his actions.

Whittington testified that the following morning, after the murders, Garceau was "really excited," RT-XI:2782, "he had an excited look on his face, upset, like he didn't know what to do." *Id.*:2864.[32] Such behavior is explainable as a reaction to the killings, and does not necessarily indicate intoxication. The testimony from Susan is even more remote from the time of the killings. Whittington regularly supplied Garceau with cocaine, but made no mention of doing so that morning. Even if Whittington did not supply Garceau with cocaine after the murders and Garceau possessed the cocaine Susan saw him freebase later that morning before the murders, the trial evidence was insufficient to support the conclusion that Garceau was intoxicated at the time of the murders. The court did not err in refusing the voluntary intoxication instruction.

Garceau suggests absence of a voluntary intoxication instruction prevented his presentation of this theory of defense. Mr. Simrin asserts he "was barred by the trial court from even explaining to the jury, in argument at the guilt phase, the effect that Mr. Garceau's cocaine use had upon him." Ex. 49:4. Mr. Simrin's recollection is mistaken. He was not precluded from arguing the cumulative effect cocaine use had on Garceau's conduct. RT-XIII:3652-54. Mr. Simrin mentioned more than once in closing argument during the guilt phase the effect that Garceau's drug use had on his behavior and that it prevented a premeditated and deliberated state of mind. RT-XIV:3734-35, 3756, 3774. The trial court's refusal of the voluntary intoxication instruction did not impair Garceau's right to present his defense. Claim S is denied on the merits.

Claim T - Cumulative Error at Guilt Phase

Garceau argues all the errors impermissibly allowed the jury to consider evidence against him without proper instruction, undermining his credibility, enhancing that of accomplices, to impermissibly lighten

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32. Although Shepard also saw Garceau immediately after the murders, her testimony made no mention of his behavior or mental state.

the prosecutor's burden of proof, constituting cumulative prejudicial error. None of Garceau's claims independently establish a violation of federal rights. Where no claim states a violation of constitutional law, there is no reason to grant habeas relief based on cumulative error. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996). *See also Hoxsie v. Kerby*, 108 F.3d 1239, 1245 (10th Cir. 1997) ("Cumulative-error analysis applies where there are two or more actual errors"). Even assuming, *arguendo*, that constitutional error occurred at Garceau's trial, prejudice has not been established. The record provides substantial support for the jury's conclusion that, consistent with his numerous confessions, Garceau ruthlessly murdered Maureen and Telesforo. Claim T is denied on the merits.

Claims U, V, W - Erroneous Admission During Penalty Phase of Other Crimes Evidence

Generally, evidentiary error does not provide habeas relief unless it violates due process by rendering the trial fundamentally unfair. *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (*citing Estelle v. McGuire*, 502 U.S. at 67-69); *Kealohapauole*, 800 F.2d at 1465 (habeas only available for a deprivation of federal rights). If Garceau "had challenged only the state court's evidentiary ruling, he would have alleged no deprivation of federal rights. However, [Garceau] claims the [other crimes evidentiary rulings] deprived him of due process under the fourteenth amendment, . . . a cognizable claim under [28 U.S.C.] § 2254," *Kealohapauole*, 800 F.2d at 1465, undermining the reliability of the penalty verdict.

Garceau objects to the evidence of a 1981 possession of a machine gun charge, multiple felon in possession counts, and a 1982 arrest for kidnapping and possession of an explosive device. The trial court denied the motions to exclude, after a hearing on the kidnapping charge before that evidence was admitted. The State contends this criminal activity was part of Garceau's criminal history and properly considered to show character and background relevant to the appropriate penalty. The California Supreme Court addressed the identical claim and held the unadjudicated crimes evidence did not violate due process, make the penalty unreliable, nor violate double jeopardy principles.

Garceau, 6 Cal. 4th at 199-200. Garceau provides nothing new to overcome the presumption of correctness given to the state court findings. The evidence of unadjudicated criminal activity gave the jury insight into Garceau's past conduct and character. It did not render the penalty trial fundamentally unfair. Claim U is denied on the merits.

Claim V separately attacks evidence of the Sems's kidnapping, asserting guilt was not shown beyond a reasonable doubt. The California Supreme Court held Ms. Sems's out-of-court identification of Garceau as the driver of the truck during the alleged kidnapping was sufficient for admitting evidence of the incident. *Garceau*, 6 Cal. 4th at 201. The precondition to admissibility is not proof of Garceau's involvement beyond a reasonable doubt; that is a jury question. *Id.*

Garceau makes no further showing to overcome the presumption of correctness given to the state court findings. Substantial evidence supported Garceau's role in the alleged kidnapping. Its admission did not render the penalty trial fundamentally unfair. Claim V is denied on the merits.

Claim W criticizes the judge's refusal to hold a hearing on the 1981 and 1982 unadjudicated weapons charges. Garceau contends limiting instructions could not cure this error.

The California Supreme Court found Garceau did not request a hearing, so the issue was not preserved for appeal. *Garceau*, 6 Cal. 4th at 203. Even if the issue had been preserved, substantial evidence established each element of the alleged offense; i.e., Garceau was a felon, police searches uncovered illegal weapons, and additional evidence showed Garceau possessed weapons. *Id.* at 203-04. Garceau offers nothing new to overcome the presumption of correctness given to the state court findings. The weapons evidence was probative to Garceau's criminal lifestyle, dangerousness, the associations he maintained, and did not render the proceedings unfair. Claim W is denied on the merits.

Claim X - Prosecutor's Comment on Future Dangerousness

Garceau argues no evidence supported the prosecutor's argument as to his future dangerousness, or that Garceau posed a threat while in custody, and asserts the argument against him was inaccurate, denying

him due process. Garceau's view would limit a capital jury's consideration of future dangerousness to the probability of harmful conduct in prison, since a capital crime defendant will not be eligible for parole or release from prison. From this premise, Garceau concludes evidence of prior felonies and violent acts are not predictive such conduct will continue in prison. Garceau argues that the absence of evidence he had committed violent acts in custody proves he does not pose a threat to the safety of other inmates and jailers. He also claims the prosecutor gave no notice that future dangerousness would be used in aggravation.[33] Garceau suggests the prosecutor's argument did not ask the jury to draw legitimate inferences from the evidence, but rather urged death because Garceau failed to prove the absence of his potential for future dangerousness, violating his due process right to notice and Sixth Amendment right to counsel.

The State rejoins this claim is waived by Garceau's failure to object at trial, as the alleged misconduct was curable by admonition. The prosecutor commented in closing argument on the weight of mitigation evidence and referred to future dangerousness in response to the defense argument that Garceau was a model prisoner. The State contends no § 190.3 notice was required because the prosecution presented no evidence of future dangerousness. Even if § 190.3 includes a notice requirement for prosecution argument, an exception to the notice requirement exists for rebuttal evidence.

The prosecutor was entitled to comment on future dangerousness, a proper subject for a capital jury to consider in fixing sentence. *California v. Ramos*, 463 U.S. at 1001-04. Here, the prosecution offered no evidence of future dangerousness. The argument was made only in rebuttal to Garceau's assertion that he was a model prisoner. Claim X is denied on the merits.

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33. § 190.3 requires that notice be given prior to trial of *evidence* the prosecution intends to present in aggravation during the penalty phase. However, evidence introduced in rebuttal to evidence submitted by the defendant in mitigation may be introduced without notice.

Claim Y - Prosecutorial Misconduct During Penalty Phase

Garceau contends inflammatory and improper remarks by the prosecutor at the penalty phase, "rendered his sentence unfair." Specifically, (1) the prosecutor's appeal to emotions in mentioning the frailty of Telesforo, urging death based on the status of the victim; (2) the evidence of an "arsenal" of weapons which the prosecutor admitted was inadmissable under § 190.3 and belatedly tried to justify as "corroborative" of Sems's testimony; (3) converting neutral and mitigation evidence into aggravation evidence by: (a) arguing future dangerousness in response to Garceau's record of good adjustment in prison; (b) arguing Garceau's brother "turned out all right," in response to evidence about Garceau's childhood; and (c) arguing other veterans are not "kid killers," in response to evidence about his Vietnam service; and (4) suggesting sympathy was a relevant mitigating factor only to the extent it mitigated the severity of the crime.

The State rejoins Garceau's failure to object at trial waived the alleged misconduct which was curable by admonition. The comment about Telesforo was proper as it was fair comment about the circumstances of the crime and the killing of one of the victims. Nor did the prosecutor argue that mitigating evidence was aggravating, but instead told the jury they could consider all evidence presented during the penalty phase and properly argued death was the appropriate penalty.

Although the prosecutor strenuously argued the evidence justified a death verdict, he repeatedly directed the jury to consider all the evidence, and informed them it was their job to assign weights and values to the sentencing factors. The prosecutor's comments pertaining to the "arsenal" of weapons were proper, based on evidence properly adduced during the penalty phase. There was no misconduct in the prosecutor's closing argument. Claim Y is denied on the merits.

Claim Z - Denial of Effective Appellate Review by the California Supreme Court

Garceau alleges he was denied meaningful appellate review on direct appeal because California's affirmance rate for capital cases since 1992 is 98.68 per cent. A claim challenging the *adequacy* of state

appellate review is not cognizable on federal habeas. This conclusion follows from the long-established principle that the United States Constitution does not require appellate review. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (*citing McKane v. Durston*, 153 U.S. 684 (1894)). The federal constitution only requires that an appellate forum be accessible and available to all, regardless of economic status, once a state establishes a right to appeal. *Lucey*, 469 U.S. at 393-94.

Appellate review of California's capital cases is authorized of right by Cal. Penal Code §§ 190.4(e) and 1239(b). At the time of Garceau's trial, § 1239(b) provided, "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel." Even where defendant's counsel takes *no* action, California's high court has a duty to examine the complete trial record to "ascertain[] whether defendant was given a fair trial." *People v. Perry*, 14 Cal. 2d 387, 392 (1939), *quoted in People v. Stanworth*, 71 Cal. 2d 820, 833 (1969).

Section 190.4 provides an automatic application for modification of a verdict imposing the death penalty, by which the trial judge reviews the evidence and reweighs the § 190.3 aggravating and mitigating circumstances before imposing sentence based on the jury's verdict. Denial of modification of a verdict of death is reviewed on the automatic appeal pursuant to § 1293(b). Such review includes the "evidence relied on by the [trial] judge." *Pulley v. Harris*, 465 U.S. 37, 53 (1984) (*quoting People v. Frierson*, 25 Cal. 3d 142, 179 (1979)) ("the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify the reasons for denying the modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.").

Aside from the state statutory duty to examine the complete trial record for fairness and the federal constitutional requirement that an appeal be available to indigent appellants, there are no obligations placed on the California Supreme Court that could cause a violation of an appellant's federal constitutional rights. Sections 190.4(e) and 1239(b), and the cases construing them, provide the mechanism for meaningful appellate review.

There is no federal constitutional right to adequate appellate

review. Under well-established principles of law and comity, a federal court has no jurisdiction over state courts to assess the adequacy or competence of their review since appellate review is not constitutionally required. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Claim Z is dismissed with prejudice as it raises no cognizable federal claim. It is denied on the merits.

Claim AA - Ineffective Assistance of Appellate Counsel

Garceau alleges he was denied effective assistance of appellate counsel. There is no federal basis for this claim. No claims in Garceau's federal petition were subject to state procedural default for failure to raise them on direct appeal, nor does he indicate how appellate counsel was ineffective. *See In re Dixon*, 41 Cal. 2d 756 (1953). Claim AA is denied on the merits.

Claim BB - Unconstitutional Death Penalty Statute

Garceau's challenges to California's statute are summarized as follows:

(a) The numerous special circumstances of § 190.2 embrace all murders, thus failing to narrow the class of persons for whom the death penalty is reasonably justified;

(b) The § 190.3 factors are not defined as aggravating or mitigating, thus violating the right to a reliable and fair sentence determination;

(c) The jury is not required to find that death is the appropriate sentence beyond a reasonable doubt;

(d) The jury is not required to find the existence of an aggravating factor unanimously and beyond a reasonable doubt;

(e) The jury is not required to make written findings as to the aggravating factors;

(f) Prosecuting agencies are not directed by selection procedures

in the exercise of their charging discretion;

(g) The imposition of the death penalty was disproportionate in this case; and

(h) The prosecutor's use of peremptory strikes to exclude pro-life jurors from the jury denied a fair trial and reliable sentence determination.

California v. Ramos, 463 U.S. 992 (1983), states "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty" the jury's consideration of a myriad of factors and exercise of "unbridled discretion" in determining whether death is the appropriate punishment is not arbitrary and capricious. *Id.* at 1008-09. At the selection stage, an *individualized* determination includes consideration of the character and record of the defendant, the circumstances of the crime, and an assessment of the defendant's culpability. *Tuilaepa*, 512 U.S. at 972-73. However, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision." *Id.* at 979.

Arguments (b) and (g) are foreclosed by *Tuilaepa*, 512 U.S. at 979 (jury need not be instructed how to weigh any particular factor) and *Pulley v. Harris*, 465 U.S. 37, 50 (1984) (proportionality review is not constitutionally required).

The California Supreme Court has considered and rejected the same challenges presented by arguments (a), (c), (d), (e), (f) and (h). *People v. Arias*, 13 Cal. 4th 92 (1996), rejected the challenge in (a), "California's scheme for death eligibility satisfies the constitutional requirement that it 'not apply to every defendant convicted of a murder, but only to a subclass of defendants convicted of murder.' *Tuilaepa v. California*, 512 U.S. 967, (1994). . . . [T]he special circumstances set forth in the statute are not over inclusive by their number or terms, nor have the statutory categories been construed in an unduly expansive manner." *Arias*, 13 Cal. 4th at 187 (*citing People v. Crittenden*, 9 Cal. 4th 83, 155 (1995) and *People v. Bacigalupo*, 6 Cal. 4th 457, 467 (1993)).

Arguments (c), (d) and (e) were disposed of by *People v. Cox*, 53 Cal. 3d 618, 692 (1991), holding unanimity, written findings, and proof beyond a reasonable doubt are not required to confirm aggravating factors exist, that aggravating factors outweigh mitigating factors, or that death is appropriate. *Id.* at 692; *see also, Bonin v. Vasquez*, 807 F. Supp. 589, 622-23 (C.D.Cal. 1992).

Argument (f) has been considered and rejected: "[P]rosecu-torial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary or capricious capital punishment system or offend principals of equal protection, due process, or cruel and/or unusual punishment." *People v. Keenan*, 46 Cal. 3d 478, 505 (1988); *People v. Holt*, 15 Cal. 4th 619, 702-03 (1997) (refusing to reconsider identical challenge previously rejected to California's death penalty statute). As in *Keenan*, Garceau makes no allegation of purposeful, invidious discrimination, but only asserts capital charging by the prosecutor is without standards. The California Supreme Court found the claim "patently insufficient to raise the issue of individual or systematic discrimination on invidious grounds." *Keenan*, 46 Cal. 3d at 507.

Argument (h) has been rejected: "Assuming for the sake of argument that the prosecutor exercised peremptory challenges [to remove all prospective jurors who expressed reservations regarding imposition of the death penalty], we have held on numerous occasions that the prosecution may do so." *People v. Champion*, 9 Cal. 4th 879, 907 (1995).

The grounds alleged in (a), (c), (d), (e), (f) and (h) do not violate the United States Constitution. Sentence selection in a capital case permits the jury broad discretion. *Tuilaepa*, 512 U.S. at 979. Claim BB is denied on the merits.

V. Procedurally Defaulted Claims[34]

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34. Garceau's petition is not subject to procedural bar for timeliness or under the *Dixon* rule, as his initial procedural default in state court was pre-*Clark*. *Calderon v. U.S. Dist. Ct. (Hayes)*, 103 F.3d 72, 75 (9th Cir. 1996).

On direct appeal, six of Garceau's state claims were procedurally defaulted for failure to preserve for appeal or to comply with the contemporaneous objection rule. *People v. Garceau*, 6 Cal. 4th 140 (1993). Although not raised by the State, the claims in Garceau's federal petition defaulted by the state court, are: Claims H, L, X, and Y.[35] *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998) (district court may raise issue of procedural default sua sponte).

The independent and adequate state ground doctrine, announced in *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977), "applies to bar consideration on federal habeas of federal claims that have been defaulted under state law." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (*citing Coleman v. Thompson*, 501 U.S. 722, 729-730, 750 (1991)). "[S]o long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision," *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989), and the state rule is well established and regularly applied, the claim cannot be considered on federal habeas unless a petitioner can show cause and prejudice, or a miscarriage of justice, to excuse the default. *Coleman*, 501 U.S. at 750.

It is unnecessary to resolve whether Garceau's defaulted claims are barred from federal review, as they have no merit. Even assuming California's procedural default rules were independent of federal law and were regularly and consistently applied at the time Garceau's appeal was pending in the state court, and assuming Garceau could show cause for his default, Garceau cannot show prejudice in light of the record. Garceau is not entitled to habeas relief on any of the defaulted claims.

VI. Certificate of Probable Cause

Appeal from an order denying habeas relief lies only if leave to appeal is obtained. The applicability of the AEDPA is determined by the date of the habeas proceedings, not the date of the notice of appeal. *Fuller v. Roe*, ___ F.3d ___, 1999 WL 462632, *2 (9th Cir. May 10, 1999). Garceau is not subject to certificate of appealability requirements

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35. Three of Garceau's state claims are combined into Claim Y in his federal petition.

of the AEDPA. Before enactment of the AEDPA, leave to appeal was granted by the issuance of a certificate of probable cause by the judge who denied the petition, or by a circuit judge. Former 28 U.S.C. § 2253 (1996). A certificate of probable cause issues only upon the petitioner's "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

Garceau does not meet the pre-AEDPA standard. There is no showing of the denial of a federal right, required by *Barefoot*, for any claim advanced. No certificate of probable cause shall issue.

VII. Order

For the reasons stated above, IT IS ORDERED:

1. Garceau's petition for writ of habeas corpus is DENIED on the merits on every ground advanced. All declarations and evidentiary submissions have been treated as offers of proof and fully considered.

2. No certificate of probable cause shall issue.

3. Judgment shall be entered for RESPONDENT, the State, and against PETITIONER, Robert Frederick Garceau.

SO ORDERED.

DATED: _____

_____

OLIVER W. WANGER
United States District Judge

Robert Frederick Garceau, CIV. F-95-5412-OWW-P

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SUPREME COURT
FILED
NOVEMBER 18, 1993
Robert Wandruff Clerk

COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	S004776
Plaintiff and Respondent,	)	[CR 26410]
	)	
v.	)	(Super. Ct.
	)	No. 29601)
ROBERT FREDERICK GARCEAU,	)	
	)	
Defendant and Appellant.	)	
	)	

Following the guilt phase of a jury trial, a jury found defendant Robert Frederick Garceau guilty of two counts of first degree murder (Pen. Code, §§ 187, 189),[1/] and found true the allegation of

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1. All further statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING OPINIONS

personal use of a knife in the commission of each offense (§ 12022, subd. (b)) and a multiple-murder special circumstance. (§ 190.2, subd. (a)(3).) At the penalty phase, the jury fixed the penalty at death, and thereafter the court imposed a sentence of death.

This case reaches us on automatic appeal. (Cal. Const., art. VI, § 11; § 1239, sudb. (b).) We affirm the judgment in its entirety.

FACTS

The evidence at trial established that on September 6 or 7, 1984, in a Bakersfield apartment, defendant fatally stabbed his girlfriend, Maureen Bautista, in the presence of her 14-year-old son, Telesforo. Immediately thereafter, defendant fatally stabbed Telesforo. Several hours after defendant committed the murders and departed from the crime scene, two of his acquaintances, Greg Rambo and Larry Tom Whittington, returned to the apartment and concealed the victims' bodies inside a bedroom dresser. Defendant and Rambo transported the dresser containing the bodies out of Kern County to the town of Shandon, located in San Luis Obispo County, entombing the dresser beneath a layer of fresh concrete in the yard behind Rambo's residence.[2/]

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2. Five months after these events, on February 19, 1985, defendant fatally shot Greg Rambo. The evidence suggested that Rambo had been killed in a shed in the town of Parkfield, located in the southwest corner of Monterey County. Prior to the trial in the present case, defendant was tried separately in Monterey County for the Rambo killing, convicted of murder, and sentenced to serve a state prison term of 33 years to life. In June 1987,while the present case was in trial, the Court of Appeal affirmed defendant's conviction for the Rambo murder (but reversed defendant's additional convictions for conspiracy and methamphetamine manufacturing) in an unpublished opinion. (People v. Garceau (June 3, 1987) H001539.) His conviction for the murder of Rambo is not before use on this

Although no physical evidence was discovered linking defendant to the Bautista murders, several of his acquaintances testified that he confessed committing the crimes to them prior to his arrest in March of 1985. The defense focused upon impugning the credibility of these witnesses. Defendant did not present an alibi defense, nor did he testify.

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appeal.

Prior to the defendant's trial for the Bautista murders, defense counsel informed the prosecution and the trial court that he intended to use the Rambo killing to reinforce the defense theory that one or more of defendant's acquaintances had a motive to murder the Bautistas and Greg Rambo. Thus, (Footnote continued on next page.) (Footnote continued from previous page.) the defense had no objection to the prosecutor introducing facts of the Rambo murder in the prosecution's case-in-chief. In his opening statement, defense counsel informed the jury that Rambo had been "murdered." During the trial, the jury heard testimony suggesting that defendant has murdered Rambo, but never was apprised that defendant has been convicted of that offense.

I. GUILT PHASE EVIDENCE

A. The prosecution's case

1. Overview

The prosecution's case rested largely on evidence that defendant had, on numerous occasions, confessed his participation in the crimes to acquaintances with whom he had been involved in the manufacture of methamphetamine. According to the prosecution, defendant killed Maureen Bautista because he feared she would "snitch him off" regarding his involvement in methamphetamine manufacturing, and killed her son, Telesforo, because Telesforo had witnessed defendant's lethal attack on his mother. In support of its case, the prosecution presented numerous witnesses who testified to defendant's intense hatred of "snitches" (persons who report illegal activities to third persons) and to defendant's frequent comments, both before and after the Bautista murders, to the effect that "snitches die."

2. Defendant's methamphetamine manufacturing activity, and his relationship to the victims

Greg Rambo's surviving spouse, Susan Rambo (who was granted immunity in exchange for her testimony), provided important testimony regarding the principal elements of the prosecution's case. She described defendant's methamphetamine manufacturing activity, which began during the summer of 1984 in a small trailer located behind the Shandon residence that she shared with her husband, Greg Rambo. The trailer was located unobtrusively amidst dog kennels and old, discarded automobiles. The rural, unassuming setting was well suited to the covert operation of a methamphetamine laboratory. Defendant had met the Rambos through a mutual acquaintance, Larry Tom Whittington.

The participants in the drug operation maintained well-defined roles. Susan Rambo served as a lookout. Defendant was the "cook," the person who mixed the chemicals to prepare the methamphetamine (a product that also was referred to by certain

witnesses as "speed" or "crank.") Larry Tom Whittington financed the trailer laboratory, provided necessary supplies, and sold the finished product. Greg Rambo cleaned up after the "cook" and also served as a lookout. According to Susan Rambo, Whittington paid her husband, in cash and with methamphetamine, for the use of the trailer.

According to numerous witnesses, defendant frequently "freebased" (i.e., smoked) cocaine. His profit in manufacturing methamphetamine consisted chiefly of a ready supply of cocaine from Larry Tom Whittington. According to Susan Rambo, Whittington "would supply the cocaine for [defendant], deduct what they owed him for the cook . . . and gave [defendant] money when he needed it."

Susan Rambo testified that defendant prepared his first batch of methamphetamine in the trailer laboratory in August 1984, and prepared four to six subsequent batches that year. Each batch required two to three days to prepare, during which time, according to her, defendant stayed awake, smoking his cocaine pipe. She said defendant freebased cocaine frequently, regardless whether he was manufacturing methamphetamine, and rarely was without cocaine for more than four or five days, when Larry Tom Whittington would replenish defendant's supply.

Larry Tom Whittington, testifying on cross-examination, substantially confirmed Susan Rambo's account of defendant's work habits and cocaine usage, stating that defendant stayed awake throughout each multi-day "cook," and that defendant consumed "a couple of ounces [of cocaine] a week, at least," and expense that, according to Whittington's estimate, cost defendant approximately $4,000 each week. Harlyn Codd testified (on cross-examination) that defendant "could put away an ounce of coke freebasing a day if he had it with him."[3/]

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3. On cross-examination, Larry Tom Whittington acknowledged that his participation in the Shandon drug operation occurred while he was on bail, pending the appeal of a 1982 conviction for conspiracy to distribute cocaine.

At the time of defendant's trial in 1987, Whittington – his appeal having been unsuccessful – was serving a prison sentence stemming from this 1982 conviction.

Linda Rich, a friend of Maureen Bautista, testified that in the year preceding Bautista's murder, Bautista and defendant had a stormy relationship, punctuated with numerous arguments. She recalled one such quarrel, in April or May of 1984, in which she went to the door of the Bautistas' apartment (which was open, although the screen door was closed), heard the sound of dishes breaking, and observed that a telephone had been "pulled out." On cross-examination, Rich acknowledged that defendant had been kind to Telesforo and had purchased gifts for him, but also that defendant freebased cocaine in the boy's presence.

At the end of August or the beginning of September of 1984, the Bautistas joined defendant, Larry Tom Whittington, and Harlyn Codd on a fishing trip at Lake Isabella. Codd, overheard an argument between Maureen Bautista and defendant, in which defendant threatened to kill Maureen because she planned to "snitch" (on the drug operation participants) to Eddie Nash who, according to Susan Rambo, defendant considered to be his enemy.[4/] Susan Rambo testified that Codd had told her Nash was Telesforo's father; also, that Nash once had paid defendant to fulfill a contract but that defendant had failed to perform and, as a result, Nash was "looking for" defendant.

3. The "Nash" testimony

Over defendant's objection, the trial court permitted the prosecution to introduce the testimony of several witnesses to establish a connection between defendant and Eddie Nash, who was a convicted drug dealer. By this evidence, the prosecution sough to corroborate the testimony of other witnesses that defendant knew Nash, in order to demonstrate that defendant reasonably might have harbored a great fear of Nash because of Nash's violent reputation and prior criminal activities, and generally to support the evidence, noted above, that indicated defendant murdered Maureen Bautista because he feared she

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4. Eddie Nash also was known as Edel Nasralla. Because he was referred to at trial as "Eddie Nash," we shall use that name in our opinion.

would inform Nash of defendant's whereabouts and his drug manufacturing activities.

4. The Bautista murders: defendant's conduct, confessions, and threats

On September 4, 1984, Maureen and Telesforo Bautista registered at a Bakersfield motel. The motel manager testified that he recalled seeing defendant that afternoon on the premises. On the evening of September 6, Telesforo prepaid in cash for that night's lodging. At a later point that evening, or in the early hours of the next morning, defendant and the Bautistas moved to an unoccupied Bakersfield apartment rented by Patricia Shepard.[5/]

Defendant telephoned Larry Tom Whittington near midnight on September 6, asking Whittington to meet him at Shepard's apartment immediately. When Whittington arrived, defendant said he and Maureen Bautista had been arguing loudly at the motel and had been concerned someone would call the police, so he and the Bautistas had moved to Shepard's apartment. Defendant told Whittington he was afraid Maureen was planning to "snitch him off" to Eddie Nash or Nash's attorney; defendant's fear stemmed from his belief that Nash was scheduled to be released from prison the following day. When Whittington asked defendant where the Bautistas were, he said they were sleeping in the bedroom. Whittington did not see them, nor did he hear any sounds emanating from the bedroom. He noticed the telephone appeared to have been ripped from the wall.

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5. Patricia Shepard rarely used this low-rent apartment (which the defense characterized as her "welfare front"), and she and Larry Tom Whittington lived at his residence in Bakersfield. Shepard testified she retained her lease on the foregoing apartment to cover the contingency that she and Whittington (who was married to another woman) might separate. Whittington testifies that either he or Shepard had given defendant a key to the apartment, because defendant and Maureen had been fighting.

When Whittington awoke at his Bakersfield residence the next morning, September 7, to the sound of knocking, defendant entered and announced, "I did it. . . . I killed them." Defendant told Whittington that Maureen Bautista "was going to snitch me off [and] I know how to take care of snitches." When Whittington asked defendant to lower his voice so Shepard would not hear the conversation, defendant replied that Shepard should hear what happened, because the deaths had occurred in her apartment. She thereafter joined the conversation. Both Whittington and Shepard testified that defendant told them he had killed Maureen Bautista and "the kid" the previous evening.

Shepard further testified that defendant stated he had killed the Bautistas by slitting their throats with a knife. She testified that defendant demonstrated to her the manner of stabbing. When she (or Whittington) asked why defendant had killed Telesforo, defendant replied that Telesforo had seen him kill the boy's mother. Defendant told Shepard and Whittington that Telesforo had been afraid of "Jason," the fictional killer depicted in the motion picture "Friday the Thirteenth," but that the boy should have been afraid of defendant instead of "Jason."

A quarter of an hour later, defendant departed from Whittington's Bakersfield residence, informing him that defendant had to leave town, and driving off in Maureen Bautista's automobile, a beige Honda Accord.

Susan Rambo testified that defendant sped into her yard on a Friday morning early in September (September 7 was a Friday), driving Maureen Bautista's automobile. Defendant was "completely erratic, very hyper, babbling, not making sense," and excitedly stated: "They wouldn't believe me. I kept telling them. They wouldn't believe me. They should know what happens to snitches. Now she's dead."

Later that morning, after smoking his cocaine pipe, defendant appeared to calm down and make more sense. Defendant explained that Maureen Bautista had been yelling about "snitches," and that Maureen was going to "snitch" on everyone involved in the drug operation.

Susan Rambo testified defendant told her that when he stabbed Maureen Bautista, Telesforo began screaming hysterically. Defendant told Telesforo to shut up, and stabbed him when he did not. Defendant explained to Susan Rambo, "You have to take out all

witnesses."

Defendant also reminded Susan Rambo she too should be aware of what happens to "snitches": "If you don't want it to happen to you, you know you don't say anything. This is part of the game. This is part of the rules, part of the business. You're in it. You're involved." His threat made her afraid to contact the police, as did additional threats he directed toward her on numerous subsequent occasions regarding "the laws of snitches," his reminders that he killed "snitches," and his habit of arming himself with a gun and a knife.

On that same morning, September 7, Susan Rambo noticed that dark stains had discolored the pants defendant was wearing. Later that day, she observed defendant seated near her washing machine, naked, while the machine was operating.

Wayne James, another acquaintance of defendant, testified that defendant hated "snitches" and had told James that he had killed Maureen Bautista because she was going to "snitch him off," and that her son had walked in while defendant was killing her, so defendant had to "snuff him" too. Defendant told James he had killed the Bautistas by "stab[bing] them and cut[ting] them up with a knife."[6/]

5. Disposal of the Bautistas' bodies

Greg Rambo and Larry Tom Whittington returned to Shepard's apartment on September 7, placed the bodies of Maureen and Telesforo Bautista inside a hollow bedroom dresser, and, on the following day, defendant and Rambo transported the makeshift coffin to the Ramos' residence. Defendant thereafter told Susan Rambo that he and her husband were departing for Los Angeles for the purpose of

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6. Defense counsel sought to impeach James on cross-examination by eliciting testimony from him that detailed his history of drug usage and sales, his failure accurately to recall Telesforo's name (he testified the boy's name was "Brian"), and his failure to inform the police upon learning of Greg Rambo's murder.

removing defendant's belongings from Maureen Bautista's apartment, and that if anyone asked about him or Maureen, she should reply by stating that she had not seen them in weeks.

Whittington testified that he and Patricia Shepard returned to Shepard's apartment to scrub off the bloodstains. He testified that he was able to remove the bloodstains, except for those on the carpet, which required repeated efforts at cleaning. Shepard testified, on cross-examination, that she had purchased the carpet cleaner and other materials that were used to clean her apartment following the killings.

After defendant and Greg Rambo departed for Los Angeles, Rambo called his wife and requested that she ask his cousin, Doug Frederick, to obtain a backhoe and dig an eight foot by ten foot hole in the Rambos' backyard. Rambo instructed his wife to tell Frederick that the hole was needed for the construction of a new drainage system for the Rambos' dog kennels. Susan Rambo did so.

Doug Frederick testified that he dug the hole on September 6, 7, or 10, 1984; Susan Rambo testified that she awoke on a Monday morning to the sound of a backhoe operating on the property, a circumstance suggesting that Frederick had dug the hole on Monday, September 10. She testified that the hole appeared to be "a couple hundred feet behind the house in the back corner of the lot."

Following defendant's return to Shandon, Susan Rambo noticed the presence of several bags and boxes in her garage, including a computer that defendant had given Telesforo Bautista, a television, a stereo, and some guns. At defendant's request, she purchased cement, bags for the bodies, and a needle to sew up the bags. Defendant told her he intended to place one foot of cement over the Bautistas' bodies. Susan Rambo testified that during the next few days, she observed defendant shoveling dirt into the hole for periods of up to one hour at a time.[7/]

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7. Susan Dalton, a friend of Maureen Bautista's who last had spoken with her on September 2, 1984, reported her missing near the end of that month. Dalton's report was, in part, prompted by her visit to the Bautistas' residence, which she testified had been ransacked. Photographs were scattered

6. Defendant's conduct following his entombment of the Bautistas' bodies

Defendant resided with the Rambos until late November or December of 1984. On numerous occasions during this period, Susan Rambo heard defendant refer to "snitches." Once defendant told her, "You know what happens to snitches," then removed a butcher knife from a magnetic rack on her kitchen wall and, declaring the knife to be "just about right," made several stabbing or slashing motions. She testified that on another occasion, defendant popped open a switchblade knife that "he would play with . . . constantly," and used it to stab a cardboard box that she was carrying. Defendant also told her that the ghost of Maureen Bautista was haunting him.

Susan Rambo testified that defendant moved out of the Ramos' residence in late 1984, to a trailer house on her father's property in Parkfield, where defendant continued to manufacture methamphetamine in the course of the ensuing few months.

Harlyn Codd testified that in February 1985, he and defendant were watching a violent movie at Codd's residence in Porterville, and that defendant confessed to having committed the Bautista murders. According to Codd, the movie nauseated defendant, who remarked that the film reminded him of what had happened to Maureen Bautista and to "the kid." Defendant stated to Codd that he had "offed" the Bautistas by "cut[ting] them up."

7. The murder of Greg Rambo, and the disposal of his body

Although the present appeal does not involve defendant's conviction for the murder of Greg Rambo (see fn. 2, ante), the jury heard evidence, summarized below, related to that murder. Much of this evidence was introduced by the defense during its cross-examination of

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throughout the residence, and those depicting defendant were missing. Defendant's clothes were gone. Also missing were Maureen's automobile and stereo and Telesforo's computer.

prosecution witnesses, in an effort to undermine the witnesses' credibility by introducing evidence of their odd behavior, complicity, and deception in the aftermath of Greg Rambo's murder.

Susan Rambo testified (on cross-examination) that her husband had pistol-whipped her and placed a handgun to her head on January 23, 1985, because he was angry over her failure to notice a pickup truck that had parked in their backyard. She testified: "He told me he would give me five minutes to get my stuff and get out." The Rambos separated, and Susan went to live with her parents in Parkfield.

Susan Rambo further testified that she last had seen her husband alive on February 19, 1985 – on an occasion when he was in a rage. On the following day, defendant telephoned her to say her husband would "never bother her again." She feared defendant's comment meant her husband was dead. Defendant requested that she acquire a tarp or some other object that could be used to dispose of various items (which he did not identify), and she obtained a sleeping bag. Defendant also asked to borrow her father's bulldozer to dig a hole, but her father refused.

Harlyn Codd testified that in February 1985, defendant telephoned him and said, Greg's dead. I killed him." According to Codd, defendant told him he had shot Rambo three times.[8]

Because Codd was intoxicated at the time of defendant's telephone call, Codd refused defendant's invitation to visit him that day in Parkfield. Codd met defendant the following day, and the two of them went to Parkfield to retrieve Greg Rambo's body from a shed. Codd testified that defendant feared Rambo "was going to be a snitch and he offed him." Rambo's body was wrapped in a sleeping bag and a blanket when Codd saw it.

Resolving to move the body at a later date, defendant and Codd proceeded to defendant's trailer, where defendant freebased

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8. Leonard Miller, a Tulare County pathologist, testified that Greg Rambo had been shot three times and had died from a gunshot wound to the heart. Miller opined that a gunshot wound to the back of the victim's neck had been fired from a distance of only a few inches, and was the last of the three shots.

cocaine. Codd also ingested cocaine in order to remain awake, because he did not trust defendant.

Codd further testified defendant said he "wanted to cut [Rambo's body] up, stick dynamite in him and blow it up, cut his hands off, knock his teeth out, disfigure him to leave no identification marks or anything . . . so [Rambo] couldn't be identified." Instead, the pair drove to Tulare County, deposited Rambo's body in an orange grove, and returned thereafter to Codd's residence. The following morning, Codd and defendant retrieved Rambo's body, transported it to an isolated section of the county, and dumped it in a ravine known as Deer Creek Canyon. Codd acknowledged selecting the site and on cross-examination stated that after defendant's arrest, he led sheriff's deputies to the spot where he and defendant had dumped the body.[9]

Wayne James testified that at some point after selling defendant a vehicle in February 1985, defendant threw him a spent .38 cartridge, telling James it was the shell that had killed Greg Rambo. Defendant informed James that he and Harlyn Codd had disposed of Rambo's body the previous evening in a ravine located outside Porterville.

On March 3, 1985, in view of Greg Rambo's extended absence from the Shandon residence he had occupied with his wife Susan, she filed a missing person's report with the San Luis Obispo County Sheriff's Department. She testified on cross-examination that despite her awareness (on that date) of evidence suggesting her husband's violent demise, she nonetheless was not certain at that time that he was dead, and simply "did not know where he was." She acknowledged being the beneficiary of her husband's $100,000 life

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9. Defense counsel sought to impeach Codd on cross-examination by eliciting testimony from him that during Codd's initial conversations with sheriff's deputies regarding Greg Rambo's death, Codd failed to mention that defendant had confessed the Bautista murders to him. Codd also admitted that when law enforcement personnel initially asked him whether he knew anything about Greg Rambo's murder, he had lied, denying any such knowledge.

insurance policy, and telling defendant she needed to locate her husband's body in order for her to be able to collect the insurance proceeds.

Susan Rambo also acknowledged that after cleaning up the Parkfield shed that had concealed her husband's body prior to its removal by defendant and Harlyn Codd, she assisted friends in searching for her husband. She acknowledged telephoning her husband's answering machine several times in the presence of other persons in an effort to fool them into believing she was attempting to locate him. She testified she engaged in the foregoing unusual activity and refrained from calling the authorities, because she feared defendant, Whittington, and Whittington's brother, Bill, each of whom, she said, "carried machineguns and automatic weapons."

8. Defendant's arrest

Susan Rambo testified that near the end of February 1985, she was "very upset," and defendant told her he did not believe she "was going to hold up in front of questioning or . . . be able to keep up [her] part." She stated that defendant gave her his driver's license, admonishing her: "Here, I want you to be sure and get my name right if you snitch, if you go to the cops." Susan Rambo interpreted defendant's remark – made as his gun lay on the bed near them – as an odd and "rather macho" dare. She replied that she was attempting to stay out of town so as to avoid questions and the possibility of breaking down and becoming a "snitch." Defendant told her he was "ready for the gas chamber . . . ready any time."

On March 6, 1985, Susan Rambo contacted the Kern County Sheriff's Department. Her statements led two days later to the excavation, by law enforcement officials, of two decomposed bodies located inside a dresser buried beneath a layer of cement behind the Rambos' residence. Dental records confirmed that the bodies were those of Maureen and Telesforo Bautista.

Defendant was arrested at a coffee shop in Gorman on March 14, 1985, claiming at the time that his name was Richard Brokaw, a name he had used in registering at a nearby motel. Defendant's wallet contained documents or identification in five names, including his own

and that of Greg Rambo. A search by law enforcement officers of defendant's vehicle and motel room resulted in the seizure of several types of ammunition, including three boxes of high power .38-caliber ammunition, loose cartridges, a clip, and shotgun shells.

Shortly after his arrest, defendant telephoned Codd, stating that defendant had been "snitched off" and was "going to get the pill."

9. Physical evidence

Dr. Karl Kirschner, a forensic pathologist, testified that he conducted autopsies on the Bautistas' bodies on March 9, 1985, one day after law enforcement officials had exhumed the bodies. He opined that the bodies had been buried for at least four months. Narrow cuts in the victims' clothing suggested that the victims had been stabbed repeatedly. Kirschner testified that the larger body (Maureen's) had been stabbed 11 times in the chest, and he opined the victim had died as a result of those wounds. Because each of the wounds pierced the chest cavity, Kirschner believed "any one of them could have been fatal." Kirschner also stated that while this victim still was alive, she suffered two stab wounds in her jaw. Kirschner testified that the smaller body (Telesforo's) had been stabbed five times in the chest and twice in the back.

Expert witnesses testified that blood spatters identified in Patricia Shepard's corner bedroom were consistent with the infliction of stab wounds and with the victims' blood types, and that the spatters also indicated the presence of commercial detergent products. A bloodstain extending more than five feet across the living room carpet suggested that a bloody body had been dragged across the floor. Carpet fibers found within the dresser were consistent with those obtained from Shepard's apartment.

10. Defendant's statement "They can only gas me once"

Richard Lee, an investigator for the Monterey County District Attorney, testified that on April 4, 1985, defendant, while incarcerated in the Monterey County jail (in connection with the Parkfield murder of Greg Rambo), asked, "So you guys aren't going to

try me; is that right?" Lee replied that defendant would be tried in Kern County for the Bautista killings committed in Bakersfield, and in Monterey County for the Rambo killing. Defendant responded, "They can only gas me once. They can only take my wheels one time. Do you know what I mean?" Lee responded, "Come on Bob, that's negative vibes." Defendant laughed and said, "Yeah, negative vibes, that's right. I'm still breathing and there's a few people who ain't." Defendant then laughed again.

B. The defense case

The defense sought to establish that participants in the Shandon drug operation, other than defendant, had a financial motive that might have led one or more of them to commit the Bautista murders, as well as the murder of Greg Rambo. With that objective, the defense introduced the testimony of 15 witnesses in an effort to cast doubt upon the credibility of key prosecution witnesses whose testimony had implicated defendant in all 3 murders. In particular, the defense offered testimony aimed at impugning the credibility of Whittington by highlighting his evasive and occasionally contradictory pretrial testimony. The defense also introduced testimony directed at undercutting Susan Rambo's credibility as a prosecution witness by highlighting her odd behavior in the immediate aftermath of her husband's disappearance. The defense additionally sought to suggest that Susan Rambo might have been involved in her husband's murder, and that her motivation to hasten his demise had been fueled by lust and greed – a desire to pursue an intimate relationship with defendant, and a desire to collect on her husband's life insurance policy.

II. PENALTY PHASE EVIDENCE

A. The prosecution's case

The prosecution introduced stipulations it had entered into with the defense establishing that defendant had been convicted of second degree burglary in 1972 and possession of a silencer in 1981, both felonies. Over objections of defense counsel, the prosecution also

introduced the testimony of witnesses regarding defendant's possession of firearms in 1981 and 1982, and his involvement in an alleged kidnapping that occurred in 1982. We briefly summarize the prosecution's evidence regarding the firearms and the kidnapping.

Douglas Gerst, a police officer employed by the City of Los Angeles, testified that in 1981, during two searches of a residence located in Canoga Park, he recovered numerous weapons, including a Mac Ten machinegun (with silencer), two automatic pistols, six revolvers, six rifles, and twelve shotguns. The prosecution introduced photographs of the machinegun and silencer. Gerst testified that thousands of rounds of ammunition were found inside the residence. Utility receipts established that the premises were defendant's residence.

Diane Sems described an incident in June 1982 in which an acquaintance of hers, Terry Fabricant, forced her into a pickup truck that was driver by another man. Sems was blindfolded, driven to a residence that she did not recognize (and where she observed guns), and forced by Fabricant to ingest drugs. After Fabricant fell asleep a few hours later, she escaped; the next day, no longer under the influence of drugs, she identified the driver of the pickup truck in a police photo lineup. Sems testified that defendant resembled the driver of the pickup truck, although she was uncertain and, in fact, acknowledged on cross-examination that she could not identify the driver.

To bolster Diane Sems's testimony, the prosecution introduced the testimony of Terry Fabricant, who stated that he had been an acquaintance of defendant's in June 1982 and that defendant drove a pickup truck at that time. Fabricant was not questioned (and did not testify) regarding the facts underlying the alleged kidnapping.

To further corroborate Sems' story, the prosecution introduced the testimony of Philip Quartararol, a police detective employed by the City of Los Angeles. Quartararol testified that he had conducted the photo lineup recalled by Sems, that Sems had identified defendant during that lineup, and that Sems did not appear at that time to be under the influence of drugs. Quartararol also testified that he had obtained a search warrant for the same residence that Officer Gerst had searched one year earlier, and in the ensuing search had recovered two semiautomatic weapons, two shotguns, and several thousand rounds of ammunition. On cross-examination, Quartararol acknowledged that,

under the law in effect at the time he conducted the search in 1982, a felon's possession of the firearms he discovered was not illegal, because the weapons were not concealable.

B. The defense case

At the penalty phase, the defense presented evidence in mitigation relating to defendant's prison history, his upbringing and character, and his cordial relationship with a woman and her young daughter.

A document summarizing defendant's prison history indicated that defendant had adjusted well to prison. Defense counsel argued that this document demonstrated that defendant had been a "model prisoner."

The testimony of Russell Garceau, defendant's younger brother, was introduced in an effort to demonstrate positive attributes on the part of defendant as well as the repeated adversity that defendant had faced throughout his life. This testimony indicated that defendant had been an intelligent child, had won poetry and art contests, and was an avid reader. As a youth, defendant developed bone disease in his ankle that required frequent hospitalization and caused defendant to miss "quite a bit of his childhood."

Defendant's brother testified that his father had collected firearms, and when defendant was enrolled in junior high school, defendant had brought a gun to school and then, deciding that was the wrong thing to do, had given it to a school administrator with whom defendant had maintained a good relationship. According to this testimony, defendant was arrested and placed in a detention hall, where he frequently was beaten.

Defendant's brother further testified that at 16 years of age, defendant joined the Army, serving both domestically and in Vietnam, after which he was honorably discharged in 1968. Upon defendant's return from Vietnam, he seemed embittered and began to commit burglaries, leading to his arrest and imprisonment. Defendant had been proud to be "one of the few [inmates not] involved in violence or dope."

In 1976, defendant rented three or four acres of land in

Chatsworth, set up a horse ranch, and attempted to start a hayriding business. Defendant's brother believed that defendant was not involved in criminal activity during the two or three years he lived on the ranch, and that he had not owned any guns during this period. When the land thereafter was sold, defendant was compelled to sell his possessions and leave the ranch.

Defendant's brother further testified that defendant had a generous nature, noting, for example, that "he used to borrow money from me to give to the blind man . . . ." Defendant always had repaid his debts, and made three years of automobile loan payments for the widow of a deceased business partner. Defendant often forgave loans that he had made to others. After his father's death, defendant visited and kept in touch with his mother, who resided in Ohio.

Defendant's brother testified that during the 1980's, defendant "started on drugs . . . that's when I saw his whole personality change . . . . Up to that time I thought he was probably the most honorable person I had ever met . . . . Then he started getting involved in cocaine and then all of a sudden he wouldn't show up when he was supposed to, he wasn't paying back like he used to pay back his loans and in a sense, to me, became flaky, his whole life seemed to change at that time. . . ."

The defense also introduced the testimony of Starr Calliez, who described defendant as being "very sensitive [and] very considerate." Calliez stated that in 1973, she was an acquaintance of defendant's brother, who mentioned at that time that he had a brother in prison. Calliez began corresponding with defendant, visited him in prison many times, and developed an intimate relationship with him following his release. Calliez stated that defendant was "very friendly and nice" to her six-year old daughter, buying her gifts, and that the three of them engaged in activities as a family. Calliez acknowledged that defendant had not adjusted easily to life outside prison but noted that during their relationship, she never had known defendant to use drugs or resort to violence.

Calliez's close relationship with defendant ultimately ended, and thereafter, in 1983, she married someone else. Calliez was "shocked" to learn of defendant's possible involvement in the illegal activities described at trial. Notwithstanding the evidence establishing

defendant's murder of a mother and a child, Calliez still would feel comfortable in the event she and her daughter were to be alone in defendant's company.

DISCUSSION

I. JURY SELECTION ISSUES

A. Alleged Wheeler error

Defendant contends the prosecutor employed peremptory challenges purposefully to exclude Hispanic-surnamed women from the jury, and that the trial court committed prejudicial error in denying defendant's motions for mistrial based upon our decision in People v. Wheeler (1978) 22 Cal.3d 258.

The prosecutor exercised peremptory challenges to remove the following prospective jurors: Sharon Montoya, Dolores Nejera, Jane Chavez, Lucy Martinez, and Hope Vasquez. Immediately following the excusal of Vasquez, defense counsel moved for a mistrial on the ground that the prosecutor improperly had exercised peremptory challenges on the basis of group bias, resulting in the purposeful exclusion of Hispanic-surnamed women. Defense counsel made a second motion for mistrial pursuant to Wheeler immediately following the prosecution's exercise of a peremptory challenge against Rita Asuncion, the sixth and sole remaining Hispanic woman on the panel.

The trial court denied the Wheeler motions, finding in each instance that defendant had failed to establish a prima facie case of discrimination. (See People v. Wheeler, supra, 22 Cal.3d at p. 280.)

On appeal, defendant contends that the trial court erred in denying his motions for mistrial. As we shall explain, we reject defendant's argument, because the record supports the trial court's findings that a prima facie case of discrimination was not established.

Recently, in People v. Sims (1993) 5 Cal.4th 405, 428, we restated the applicable law: "Under the principles articulated in Wheeler, supra, 22 Cal.3d 258, 276-277, a party may not employ peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely

because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (Wheeler, supra, 22 Cal.3d at p. 276; People v. Fuentes (1991) 54 Cal.3d 707, 713 [286 Cal.Rptr. 792, 818 P.2d 75]; see Powers v. Ohio (1991) 499 U.S. ____ [113 L.Ed.2d 411, 111 S.Ct. 1364].) 'If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias. [Citation.] To establish a prima facie case, the moving party should first make as complete a record as possible; second, the moving party must establish that the persons excluded are members of a cognizable group; and third, the moving party must show a strong likelihood that the persons are being excluded because of group association.' (Fuentes, supra, 54 Cal.3d at p. 714.) Once the moving party has established a prima facie case, the burden shifts to the other party to come forward with a group-neutral explanation for the exercise of the challenges related to the particular case being tried. (Wheeler, supra, 22 Cal.3d at pp. 281-282; Fuentes, supra, 54 Cal.3d at p. 714.)"

In the present case, defendant's motions for mistrial were timely made. Also, we assume that defendant is correct in asserting, without challenge by the People, that Hispanic-surnamed women constitute a "cognizable group" under Wheeler. (See People v. Clair (1992) 2 Cal.4th 629, 652; People v. Motton (1985) 39 Cal.3d 596, 605-606 [Black women are a cognizable subgroup]; see also People v. Trevino (1985) 39 Cal.3d 667, 686 [Hispanics are a cognizable group for purposes of Wheeler], disapproved on another point in People v. Johnson (1989) 47 Cal.3d 1194, 1219-1221.) Nevertheless, defendant failed to show a "strong likelihood" that these prospective jurors were excluded because of a group association. His motions merely reiterated the names of the jurors removed by the prosecution and alleged that, because the removed jurors all were Hispanic-surnamed women, he had made a "prima facie showing."

Thus, the factual context underlying defendant's motions resembled that described in People v. Howard (1992) 1 Cal.4th 1132, 1154. In Howard, the defendant relied solely upon the circumstance that the prosecutor's peremptory challenges had been directed toward the only two Black jurors. (Ibid.) In this case, as in Howard, the defendant

"did not make any effort to set out the other relevant circumstances, such as the prospective jurors' individual characteristics, the nature of the prosecutor's voir dire, or the prospective jurors' answers to questions." (Ibid.)

"[W]hen a trial court denies a Wheeler motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire. [Citations.] As with other findings of fact, we examine the record for evidence to support the trial court's ruling. Because Wheeler motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in questions, we affirm. [Citation.]" (People v. Howard, supra, 1 Cal.4th at p. 1155.)

The trial court observed that there were grounds upon which the prosecutor reasonably might have challenged the jurors in question: "Certainly as to Mrs. Vasquez, she repeatedly claimed hardship and was very dissatisfied when I told her she couldn't be excused. I don't see why the People should be required to keep her. . . . I know Mrs. Chavez had medical problems, we had a hard time getting her in, she wanted to be excused. Martinez was very difficult getting her in, Najera was in her first trimester of pregnancy and Montoya I just don't recall."

The record supports the trial court's denial of defendant's motions. Based upon hardship, Hope Vasquez expressed reluctance to serve as a juror, mentioning a logistical difficulty related to the transportation of her daughter to school and her own travel to court for the trial. Dolores Nejera stated that some members of her family had run afoul of the law and had been incarcerated; one was a fugitive. Sharon Montoya expressed strong reservations relating to the responsibility she would face in the event the trial reached the penalty phase, indicating she did not believe anyone had the right to take the life of another person, and expressed concern based upon having heard of "innocent people being sentenced all the time." Lucy Martinez's contradictory responses to questions presented to her during voir dire examination suggested that she might have difficulty comprehending the questions. Jane Chavez also provided contradictory responses regarding her views on the death penalty, stated that she found the law confusing and probably would

forget testimony, and opined that serving as a juror in this case "would be awful." Rita Asuncion, whose removal led to defendant's second Wheeler motion, indicated it was difficult for her to understand the concept of reasonable doubt, as well as the distinction between the guilt and penalty phases of the trial.

Defendant contends that the trial court's observations regarding the presence of other Hispanic-surnamed individuals who remained on the panel suggest that its denial of defendant's Wheeler motions stemmed from the court's failure to recognize Hispanic-surnamed women as a cognizable class. We disagree. The record is clear that the trial court's denial of defendant's motions for mistrial was based upon its consideration of the individual jurors' responses on voir dire, and the record is sufficient to support the trial court's conclusion that a prima facie case of discrimination was not established. We conclude the trial court properly found that defendant failed to satisfy the Wheeler requirement that he establish a prima facie case of discrimination. (See People v. Howard, supra, 1 Cal.4th at pp. 1153-1156; People v. Hayes (1990) 52 Cal.3d 577, 605-606; People v. Bittaker (1989) 48 Cal.3d 1046, 1092 [prima facie case of discrimination not established where challenged jurors' responses indicated a proper basis for their excusal]; see also People v. Sims, supra, 5 Cal.4th at pp. 428-432.)

We also reject defendant's claim of federal constitutional error involving his rights to a fair trial and to equal protection of the laws. Having failed to raise the Sixth Amendment claim below, defendant has waived this issue. (People v. McPeters (1992) 2 Cal.4th 1148, 1174.) Each claim also is substantively deficient; although defendants have a right to a jury drawn from a fair cross-section of the community, they have no right to a jury that reflects the racial composition of the community. (Holland v. Illinois (1990) 493 U.S. 474, 480, 482-483; see also Taylor v. Illinois (1975) 419 U.S. 522, 538.) Defendant's equal protection claim lacks merit because, as discussed above, the trial court's finding that defendant failed to make a prima facie showing that the jurors were excluded on the basis of group bias is supported by the record. (Cf. Johnson v. Vasquez (9th Cir. Sept. 2,

1993) ____ F.2d ____ [Dock, No. 91-56395].)[10]

B. Alleged wrongful failure to exclude jurors for cause

Defendant contends the trial court improperly denied defense motions to excuse for cause three prospective jurors who possessed views favoring the death penalty that defendant alleges would have impaired their ability to be fair and impartial. The three prospective jurors never were impaneled, however, having been excused following defendant counsel's exercise of peremptory challenges against them. Defendant nonetheless argues that the trial court's failure to exclude these prospective jurors for cause violated his rights to a fair and impartial jury under the federal and state Constitutions.

Both constitutions guarantee a defendant a trial by an impartial jury. (Williams v. Superior Court (1989) 49 Cal.3d 736, 739-740.) A juror may be challenged for cause based upon his or her views of capital punishment if those views would prevent or substantially impair the performance of the juror's duties in accordance with the court's instructions and the juror's oath. (Wainwright v. Witt (1985) 469 U.S. 412, 424.) A defendant who claims that the trial court wrongly denied a challenged for cause must demonstrate that his or her right to a fair and impartial jury was affected. (People v. Bittaker, supra, 48 Cal.3d at pp. 1087-1088.)

Defendant fails to make the requisite showing. At the time the jury was sworn, he had 16 peremptory challenges remaining. Thus, defendant cannot demonstrate that his ability to excuse peremptorily any other juror was affected by his decision to exercise peremptory challenges against the three jurors in question. (People v. Raley (1992) 2 Cal.4th 870, 904-905; People v. Kelly (1992) 1 Cal.4th

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10. Throughout this opinion, we shall discuss the merits of particular claims, such as this one, even though they are procedurally barred, when we conclude that such discussion may be helpful in evaluating future claims alleging ineffective assistance of counsel. (See People v. Mitcham 91992) 1 Cal.4th 1027, 1044, fn. 5.)

495, 518-519; People v. Howard (1988) 44 Cal.3d 375, 419, fn. 17.)

Because defendant did not exhaust his peremptory challenges, he must justify his failure to do so. (People v. Bittaker, supra, 48 Cal.3d at pp. 1087-1088.) He contends the presence of five other "pro-death" persons remaining among the jury venirepersons on the panel inhibited defense counsel's exercise of peremptory challenges. We rejected a similar argument in People v. Price (1991) 1 Cal.4th 324, 401-402, noting that defendant had failed to demonstrate that exhausting his remaining peremptory challenges would have led to the seating of a juror subject to removal for cause. In the present case, if defendant was dissatisfied with the jury as comprised, he could have exercised his remaining peremptory challenges, regardless of the views of venirepersons yet to be impaneled. No error appears.[11]

C. Alleged Witt error

Defendant contends the trial court erred when it dismissed

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11. Even if defendant's argument were devoid of the procedural deficiencies discussed above, we would find it substantively deficient. The responses of the three prospective jurors, Maria Kinde, Richard Rodriguez, and Jerry Shipman, suggest, at most, the views of persons inclined to impose the death penalty for deliberate killings, but able to set aside such personal beliefs in favor of a careful review of the evidence, guided by the trial court's instructions. Kinde stated during voir dire that she believed the death penalty should be imposed for deliberate and premeditated killings, but also stated that she could be convinced by mitigating evidence to spare a defendant's life. Similarly, although Rodriguez stated that he supported the death penalty as a means of punishment, he also stated that whether or not a death verdict should be imposed would depend upon the circumstances of the case. Finally, although Shipman stated that he favored the death penalty, he also stated that he would consider the evidence and would not hesitate to follow the law.

for cause prospective juror Cathy Wilken. During voir dire examination, Wilken explained she had a "bias" against the death penalty and did not believe she could vote in favor of a death verdict. Her responses nonetheless were somewhat equivocal; she acknowledged the possibility she could vote in favor of the death penalty. When asked whether she could evaluate penalty phase evidence pursuant to the trial court's instructions and vote in favor of the death penalty if that were the appropriate punishment, however, Wilken replied, "I truly don't know."

In excusing Cathy Wilken, the trial court relied upon Wainwright v. Witt, supra, 469 U.S. 412, in which the United States Supreme Court held that a juror is disqualified from serving in a capital case if his or her views regarding the death penalty would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (Id. at p. 424, fn. omitted.) This court has adopted the Witt standard. (People v. Ghent (1987) 43 Cal.3d 739, 767.) Our task on review is to determine whether the trial court's finding that the juror's beliefs would "substantially impair the performance" of the juror's duties is fairly supported by the record. (People v. Johnson, supra, 47 Cal.3d at p. 1223 [quoting Darden v. Wainwright (1986) 477 U.S. 168, 175]; see also People v. Cox (1991) 53 Cal.3d 618, 646-647; People v. Daniels (1991) 52 Cal.3d 815, 875.)

The performance record supports the trial court's finding. Wilken's responses indicated she was troubled by the prospect of sitting on a penalty phase jury and was uncertain whether she could set aside her bias against the death penalty in favor of weighing the evidence and following the trial court's instructions. Under these circumstances, the trial court properly could find that her views would "substantially impair the performance" of her duties at the penalty phase. Accordingly, no error appears.

D. Cumulative effect of assigned errors

Defendant contends the cumulative effect of the alleged jury-selection errors warrants reversal. In view of our foregoing discussion finding no error, we reject this contention.

II. GUILT PHASE ISSUES

A. Defendant's motion to strike "the Nash testimony"

At the conclusion of the prosecution's case-in-chief, the defense moved to strike the testimony of prosecution witnesses Eddie Nash, Tony Sylvester, Ronald Coen, and Michelle Christie (whose collective testimony we refer to as "the Nash testimony"). The motion to strike was made upon relevancy grounds and under Evidence Code section 352.[12] Outside the presence of the jury, the parties argued the relevancy of the evidence, and whether the evidence unfairly sought to establish defendant's "guilt by association" with Nash, a man defense counsel described as "obviously disreputable." The trial court denied the motion to strike, accepting the prosecution's argument that the testimony was relevant to three distinct issues – defendant's motive, defendant's state of mind, and the corroboration of other witnesses' testimony. The trial court found that the evidence was not unduly prejudicial.

On appeal, defendant contends the trial court committed reversible error in denying his motion to strike. Defendant argues this evidence was irrelevant under Evidence Code section 210, and even if the evidence was relevant, the trial court abused its discretion under Evidence Code section 352 because the probative value of the evidence was substantially outweighed by the possibility it would unduly prejudice defendant. We shall address these contentions in turn.

1. The evidence satisfied Evidence Code section 210

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12. Defense counsel had objected on the grounds of relevancy and Evidence Code section 352 prior to the prosecution's direct examination of Tony Sylvester. The trial court overruled the objection. During the prosecution's direct examination of Eddie Nash, defendant objected on the same two grounds to questions pertaining to a dead (allegedly murdered) body found in Nash's home. This objection also was overruled. Defendant also raised relevancy objections at various points during the testimony of Ronald Coen and Michelle Christie, and virtually all of these objections were overruled.

The central issue at trial was the identity of the person who fatally stabbed Maureen and Telesforo Bautista. The prosecution sought to establish that defendant had both the motive (fear of "snitches") and the opportunity (time spent alone with the victims, and their trust of him) to commit the murders. The prosecution offered the "Nash testimony" in order to help establish the identity of the killer, insofar as the evidence suggested that: (1) defendant had a motive to kill Maureen; (2) defendant's state of mind could have led him to commit the killings; and (3) the "Nash testimony" corroborated the testimony of other prosecution witnesses. In contrast, the defense theory was that defendant was not the perpetrator of the killings, that he lacked the motive to commit the crimes in view of his close relationship with the victims, and that the killings more likely were committed by a third party, such as Larry Tom Whittington, who was involved in a lucrative drug operation and had no personal relationship with the victims.

In determining the admissibility of the challenged evidence, we apply well-settled rules. Only relevant evidence is admissible. (Evid. Code § 350; People v. Babbit (1988) 45 Cal.3d 660, 681.) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. (People v. Daniels, supra, 52 Cal.3d at p. 856; People v. Alcala (1984) 36 Cal.3d 604, 631.) The trial court retains broad discretion in determining the relevance of evidence. (People v. Babbitt, supra, 45 Cal.3d at p. 681.)

The "Nash testimony" was relevant to demonstrate defendant's motive for killing the Bautistas and to establish premeditation, in view of defendant's frequently voiced hatred of "snitches" and his expressed fear that Maureen Bautista would "snitch him off" to Eddie Nash. The "Nash testimony" suggested that defendant's motive in killing the Bautistas was self-preservation – a desire to avoid having Nash, a man with a reputation for violence, learn of defendant's whereabouts and activities. In the absence of physical evidence linking defendant to the Bautista killings, the presence of a motive was particularly significant in this case. (See People v.

Edelbacher (1989) 47 Cal.3d 983, 1027-1028 [evidence of spousal rape charge of which defendant was acquitted held relevant to issue of motive in prosecution for murder of the spouse]; People v. Thompson (1988) 45 Cal.3d 86, 109 [motive an important issue where defense asserts that defendant and victim had a good relationship].) We therefore discern no error in the trial court's determination that the "Nash testimony" was relevant.

2. The "Nash testimony" was not unduly prejudicial

Defendant contends that even if the "Nash testimony" were relevant, the trial court committed reversible error in failing to exclude it as unduly prejudicial pursuant to Evidence Code section 352.[13] Defendant further contends that, contrary to the admonition contained in numerous decisions of this court (see, e.g., People v. Edelbacher, supra, 47 Cal.3d 983, 1016-1017, and cases cited), the trial court failed to state on the record that it had weighed prejudice against probative value.

The basis for defendant's motion to strike pursuant to Evidence Code section 352 was his assertion that the prosecution improperly sought to link defendant with Nash based upon testimony likely to compel the jury to speculate as to defendant's guilt by reason of Nash's illegal activities, reputation, and previous encounters with the law. In opposing the motion, the prosecution relied upon this court's decision in People v. Wright (1985) 39 Cal.3d 576, 585, in which we adopted the following view: "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues.'" (Id., quoting People v. Yu (1983) 143

13. Evidence Code section 352 provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create the substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Cal.App.3d 358, 377; see also People v. Karis (1988) 46 Cal.3d 612, 638.) After hearing the parties' arguments as to the alleged probative value and prejudicial effect of the "Nash testimony," the trial court took the matter under submission, noting on the record four days later that it was denying the motion based upon the prosecution's arguments and would consider giving the jury a limiting instruction.[14]

We discern no error in the trial court's ruling. The admission of the "Nash testimony" did present a risk of undue prejudice to defendant in view of Nash's criminal conduct, his violent reputation, and his prior association with defendant. Nevertheless, the danger that the jury might rely upon the "Nash testimony" for an improper purpose (for example, to conclude that defendant also was a violent individual) was minimized by the trial court's decision to give a limiting instruction. That instruction directed the jury to consider the "Nash testimony" only if it tended to establish the identity and the motive of the perpetrator of the killings, defendant's state of mind at the time of the killings, corroboration of other evidence, or the credibility of any other witness. The instruction directed the jury not to consider the "Nash testimony" as proof that defendant had a bad character or a disposition to commit crimes. Under these circumstances, we conclude that the risk of undue prejudice was not great.

By contrast, the probative value of the "Nash testimony" was considerable, because it bore directly upon the issue of defendant's motive to kill the Bautistas. In light of the testimony that defendant had told others that he feared Maureen Bautista would inform Eddie Nash of defendant's whereabouts, evidence pertaining to Nash's past criminal conduct and violent reputation plainly was of substantial importance in explaining why defendant might have killed a close acquaintance and her son. Moreover, the trial court's limiting instruction rendered it unlikely that the testimony establishing defendant's former association with Nash would evoke an emotional bias against defendant. Although the "Nash

14. Defendant challenges the adequacy of the limiting instruction that the trial court ultimately gave to the jury. We address this argument, post, pages ___ - ___ [typed maj. opn. pp. 72-74].

testimony" might have been damaging to defendant, it was not unduly prejudicial. (See People v. Karis, supra, 46 Cal.3d at pp. 637-638.)

We conclude that, in admitting the "Nash testimony," the trial court did not abuse its discretion under Evidence Code section 352, because it properly could find that the probative value of the testimony outweighed its prejudicial effect.

Nor do we discern error in the trial court's failure to provide a more precise description of the weighing process it engaged in pursuant to Evidence Code section 352. The parties argued at length the issue of alleged probative value versus prejudice. The trial court, after taking the matter under submission, denied defendant's motion to strike, stating: "The Court accepts the arguments of the People regarding the offer of the testimony. The Court will consider a limiting instruction. . . ." The record, including the trial court comments, sufficiently establishes that the court weighed and rejected the arguments of defendant. (People v. Claire, supra, 2 Cal.4th at p. 660; People v. Edelbacher, supra, 47 Cal.3d at pp. 1016-1017.)

B. Defendant's admission

Defendant contends the trial court erred in permitting Richard Lee to testify regarding his conversation with defendant at the Monterey County Jail, during which (according to Lee's testimony) defendant said: "They can only gas me once. They can only take my wheels one time. . . . I'm still breathing and there's a few people who ain't." Defendant argues that Lee's testimony was hearsay and, in the alternative, irrelevant. He further claims that the probative value of the testimony hinged upon unreasonable speculation that his comments to Lee evinced a consciousness of guilt, thereby abridging his right to due process of law under the federal and state Constitutions.

Defendant has waived any claim of error involving the admission of Lee's testimony, by reason of defense counsel's failure to object on the hearsay and relevancy grounds now raised on appeal (or on any other ground, for that matter). (Evid. Code, § 353, subd. (a); People v. Ghent, supra, 43 Cal.3d at p. 766.) Furthermore, even if defendant had raised a timely objection, his claim is substantively without merit, because the jury reasonably could have viewed defendant's statement to

Lee – a nonhearsay statement not offered for the truth of the matter asserted – as an implied admission of guilt. (See People v. Miranda (1987) 44 Cal.3d 57, 83-84 [defendant's actions at the time of his arrest were relevant to establish his consciousness of guilt and his knowledge of the magnitude of the crime]; People v. Mendoza (1987) 192 Cal.App.3d 667, 675-676 [defendant's statements were not hearsay, because they were not offered for the truth of the matters asserted, but "were properly characterized as admissions since an admission simply is any extrajudicial statement – whether inculpatory or exculpatory – 'which tends to prove his guilt when considered with the rest of the evidence'" (quoting CALJIC No. 2.71)].)

C. Admission of photographs and physical evidence

Over the objections of defense counsel, the trial court admitted into evidence a photograph depicting the victim's bodies shortly after they were unearthed, a photograph depicting a superficial depression of Maureen Bautista's sternum, which Dr. Karl Kirschner opined was the result of a knife wound, four small tissue samples taken from the victims, and Maureen Bautista's jawbone, demonstrating a penetrating stab wound. The prosecution offered the foregoing evidence to establish the identity of the victims, to corroborate the prosecution's expert testimony (that the victims had been killed in Patricia Shepard's apartment), and to establish that defendant had acted with malice.

In an effort to preclude admission of the challenged evidence, defense counsel offered to stipulate that Larry Tom Whittington assisted in placing the bodies in the dresser, that Maureen Bautista's death was caused by a blow of considerable force, that the jawbone had comprised part of her anatomy, and that the bodies unearthed were those of Maureen and Telesforo Bautista. After the prosecution rejected the stipulation, the trial court admitted the challenged evidence.

On appeal, defendant challenges the trial court's rulings on three grounds: (1) the evidence was irrelevant; (2) even if relevant, the probative value of the evidence was outweighed by its prejudicial effect, and therefore the evidence should have been excluded under Evidence Code section 352; and (3) the trial court, in exercising its

discretion under Evidence Code section 352, failed to engaged in a meaningful weighing of probative value against prejudice. Defendant implicitly contends that the trial court should have required the prosecution to accept the proffered stipulation.

The challenged evidence clearly was supportive of the prosecution's theory that the victims had been brutally murdered. (See People v. Wilson (1992) 3 Cal.4th 926, 937-938 [photos of murder victim depicting nature and placement of wounds relevant to prosecution's theory of deliberate killing].) Because the prosecution tried the present case on a theory of premeditated murder, the issue of malice was material, and the photographs and the jawbone were relevant to that issue. (See People v. Hendricks (1987) 43 Cal.3d 584, 594; People v. Frierson (1979) 25 Cal.3d 142, 171; 2 Witkin, Cal. Evidence (3d. ed. 1986) Demonstrative, Experimental and Scientific Evidence, § 837, pp. 801-804.) The tissue samples (extracted from the remains of the exhumed dresser, in which carpet fibers were found consistent with those found in Patricia Shepard's apartment) indicated the probability that the victims had bled in Patricia Shepard's apartment, and therefore were relevant to the prosecution's theory that the killings were deliberate, and that defendant attempted to conceal the crimes by transporting the bodies from the Bakersfield crime scene to the town of Shandon, where the victims surreptitiously were buried.

The evidence in question also was highly probative. The photograph of the mummified victims depicted their positions within the dresser (after the dresser had been unearthed and removed), thereby corroborating Whittington's testimony relating to concealment of the bodies. The photograph illustrating the superficial wound to Maureen Bautista's sternum was offered to establish that defendant employed different degrees of force during the fatal attack, and because the use of force was relevant to the question of malice, the trial court acted within its discretion in determining that the probative value of the photographs clearly outweighed any prejudice that might have been incurred by defendant as a result of their graphic nature. (See People v. Thompson, supra, 45 Cal.3d at p. 115-116 [no error in admitting photographs of victim's head and ear, through which fatal stab wound was inflicted]; People v. Ruiz (1988) 44 Cal.3d 589, 612-613 [no error in admitting "mummy-like" photos of victims].) Introduced as laboratory specimens

contained in small jars, the tissue samples were not readily identifiable as human tissue and, as noted, tended to support the prosecution's theory, supported by expert testimony, that the victims were killed in Patricia Shepard's apartment, then transported to Shandon. The appearance of Maureen Bautista's jawbone indicated that her assailant had stabbed her with sufficient force to enable the weapon to penetrate completely through the bone, strongly suggesting that the perpetrator acted with malice. We previously have upheld the admission of body parts over a defense objection similar to that raised in the present case, where the physical evidence is offered in corroboration of expert testimony (and where, presumably, photographs instead could have been utilized). The potentially shocking nature of such physical evidence is not, in itself, a basis for exclusion. (See People v. Thomas (1992) 2 Cal.4th 489, 524 [admission of teeth and bone fragments].)

Defendant contends the trial court failed to engage in a meaningful weighing process and, instead, mechanically recited that the probative value exceeded the prejudicial effect as to the various exhibits that the defense sought to exclude. With respect to each item of physical evidence challenged on appeal, however, the trial court heard arguments from both sides regarding relevance and prejudice before articulating that the probative value of the challenged evidence outweighed any prejudicial effect. The record indicates that the trial court understood and fulfilled its responsibilities under Evidence Code section 352. Nothing more was required. (See People v. Clair, supra, 2 Cal.4th at p. 660; People v. Griffin (1988) 46 Cal.3d 1011, 1027-1029.)

When respect to defense counsel's offer at trial, in an effort to have the actual evidence excluded, to stipulate to certain facts suggested by the challenged evidence, we reiterate the general rule that the prosecution in a criminal case "cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (People v. Edelbacher, supra, 47 Cal.3d at p. 1007, and cases cited.) The probative value of the challenged photographs, jawbone, and tissue samples (exhibits that we have reviewed) clearly extended beyond the scope of the defense's offers to stipulate. The prosecution therefore was not obligated to present its cases in the sanitized fashion suggested by the defense. (See People v. Pride (1992) 3 Cal.4th 195, 243.)

Based upon the foregoing, the trial court did not abuse its discretion in admitting the challenged physical evidence. (People v. Thomas, supra, 2 Cal.4th at p. 524; People v. Price, supra, 1 Cal. 4th at p. 441; People v. Ashmus (1991) 54 Cal.3d 932, 973-974.)

D. Sufficiency of the evidence

At the close of the prosecution's case-in-chief, the defense moved for a judgment of acquittal pursuant to section 1118.1, alleging that the prosecution's evidence was legally insufficient to sustain a conviction. The defense argued that the prosecution's key witnesses – Larry Tom Whittington, Susan Rambo, Patricia Shepard, Harlyn Codd and Wayne James – were accomplices as a matter of law in a drug conspiracy that resulted in the deaths of Maureen and Telesforo Bautista. Based upon the premise that a person cannot be convicted on the uncorroborated testimony of an accomplice (§ 1111), and upon the further premise that one accomplice cannot corroborate another (People v. Clapp (1944) 24 Cal.2d 835, 837), the defense argued that without the testimony of the accomplices, there would be no evidence supporting defendant's conviction. The trial court rejected these arguments and denied defendant's motion for a judgment of acquittal. In denying this motion, the trial court found that Wayne James was not an accomplice and reasoned that, even if it were to accept defendant's arguments regarding the accomplice status of other prosecution witnesses, James's testimony would provide sufficient evidence of corroboration.

On appeal, defendant reiterates his contention that his conviction rests upon the uncorroborated testimony of accomplices. As we shall explain, this contention is without merit.

In order for any one of the foregoing witnesses to have been an accomplice as a matter of law, the record must establish, as a matter of law, either that the witness aided and abetted defendant in committing the killings (§ 31; People v. Gordon (1973) 10 Cal.3d 460, 468) or was involved in a conspiracy in which that person harbored the intent to commit the offense that was the object of the conspiracy. (People v. Marks (1988) 45 Cal.3d 1335, 1345.) Neither theory was established as a matter of law by the evidence at trial.

Patricia Shepard obtained cleaning supplies after learning

of the killings and helped Larry Tom Whittington scrub the apartment where the killings had been committed. Whittington also helped conceal the victims' bodies. Susan Rambo provided aid in arranging for the victims' grave to be dug in her backyard. Although it is true that a person's post-offense acts are relevant to the issue whether he or she shared the requisite intent prior to the commission of the offense (People v. Brady (1987) 190 Cal.App.3d 124, 136), the evidence relating to these witnesses suggests that, at most, they were accessories. (§ 32; People v. Perryman (1987) 188 Cal.App.3d 1546, 1549.) No evidence connected these witnesses (or anyone else) to the actual killings. Nor did any evidence connect the other alleged accomplices, Harlyn Codd and Wayne James, to the killings or to defendant's subsequent coverup efforts. The aiding and abetting theory therefore fails for lack of evidence that any of the prosecution's witnesses assisted defendant in committing the killings.

Defendant contends that because his drug cohorts were aware of his threats to kill "snitches," they themselves also anticipated the victims' demise. Yet, the record clearly fails to establish, as a matter of law, that the killings were a "reasonably foreseeable" consequence of the methamphetamine manufacturing operation conducted on the Rambos' property. It is undisputed that the key prosecution witnesses were part of a drug conspiracy, but the evidence does not establish, as a matter of law, that the object of that conspiracy was the killing of Maureen and Telesforo Bautista. Rather, the record discloses only one instance prior to the killings – defendant's conversation with Harlyn Codd at Lake Isabella – in which defendant threatened, in the presence of any key witness, to kill "snitches."[15/] That single threat, overheard by Codd, does not demonstrate, as a matter of law, that Codd (or any other prosecution witness) was bound to defendant by a common plan to kill the Bautistas. (See People v. Rodriguez (1986) 42 Cal.3d 730, 760 [rejecting notion that a defendant's expression of an intent to kill before

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15. Codd testified that defendant and Maureen "were freebasing and they were having an argument of some type. . . . He kept talking about how he was going to get rid of her, see, because she was snitching us off."

a crime necessarily renders the cohort an accomplice to murder].) Defendant's other comments to the key prosecution witnesses regarding "snitches" occurred after the killings. Thus, accomplice status cannot properly be accorded the prosecution's witnesses, as a matter of law, on a theory of derivative liability. (See People v. Croy (1985) 41 Cal.3d 1, 11-12, fn.5.)[16] Accordingly, we find no error in the trial court's denial of defendant's motion for a judgment of acquittal.

E. Instructional error

1. Special instruction No. 3: other-crimes evidence

In addition to hearing evidence pertaining to the deaths of Maureen and Telesforo Bautista, the jury received evidence pertaining to defendant's illegal drug activity and the murder of Greg Rambo. The parties proposed instructions regarding the purposes for which the jury could consider this evidence of defendant's other crimes.

The prosecution submitted special instruction No. 3, set forth in the margin.[17] The instruction was broadly written, directing the

16. For the reasons set forth in the above discussion, the trial court properly rejected defendant's request that the jury be instructed pursuant to California Jury Instructions, Criminal (4th ed. 1979) (hereafter CALJIC) No. 3.16, which would have informed the jury that one (or more) of the prosecution's witnesses was an accomplice as a matter of law.

17. The prosecution's special instruction No. 3 provided:

"Evidence has been introduced for the purpose of showing that the defendant committed other crimes other [sic] than that for which he is on trial.

"Such evidence, if believed, may be considered by you for any purpose, including but not limited to any of the following:

"His character or any trait of his character;

jury to consider the other-crimes evidence for numerous purposes, including defendant's "character or any trait of his character." Outside the presence of the jury, the prosecutor argued that the jury should be allowed to consider evidence, such as that pertaining to the murder of Greg Rambo, bearing upon defendant's character, because the defense had indicated at the outset of the case that it would not object to the introduction of such evidence.

The defense objected to the prosecution's proposed special instruction No. 3, arguing that it was overbroad, impermissible in view of Evidence Code section 1101's proscription against the use of character evidence to prove conduct, and premised upon a mischaracterization of the defense's stipulation regarding the prosecution's use of other-crimes evidence. The defense proposed instead that the trial court instruct the jury pursuant to CALJIC No. 2.50, set forth in the margin.[18] This instruction would have limited the jury's

"His conduct on a specific occasion;

"A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show:

"The existence of any element of the crimes charged;

"The identity of the person who committed the crimes, if any, of which the defendant is accused;

"That the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged.

"You must weigh such evidence as you do all other evidence in this case."

18. CALJIC No. 2.50, as modified by the defense, would have provided:

"Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.

consideration of the other-crimes evidence to establish motive or the existence of a conspiracy. It expressly would have prohibited the jury from considering such evidence to demonstrate that defendant had a bad character or a disposition to commit crimes.

After hearing the parties' arguments, the trial court rejected the defense request that the court instruct pursuant to CALJIC No. 2.50, ruling instead that it would give the prosecution's special instruction No. 3.

On appeal, defendant contends he was denied his right to due process of law when the trial court instructed the jury regarding other-crimes evidence pursuant to special instruction No. 3. Specifically, defendant characterizes as erroneous that portion of the instruction specifying that evidence of other crimes "if believed, may be considered by [the jury] for any purpose, including but not limited to any of the following: [¶] [Defendant's] character or any trait of his character. . . ." (Italics added.) In response, the People concede that the italicized portion of the instruction was overbroad, but argue that the reliability of defendant's trial was not undermined by the giving of this instruction.

Not withstanding the parties' agreement at the outset of the case to allow the admission of evidence pertaining to the murder of

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"Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

"Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

"A motive for the commission of the crime charged; or,

"The existence of a conspiracy.

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you would do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose."

Greg Rambo, it is clear the trial court erred in giving the italicized portion of special instruction No. 3. Subject to certain exceptions inapplicable here, evidence pertaining to a defendant's character is inadmissible when offered to prove the defendant's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).)

In the present case, the italicized portion of the challenged instruction impermissibly invited the jury to consider certain evidence (e.g., that defendant killed Rambo) for the purpose of establishing defendant's propensity to commit murder. Assuming the jury considered such evidence in that context, the jury arguably might have inferred that because defendant had killed Rambo, defendant also was capable of killing other friends, such as Maureen and Telesforo Bautista. If the jury drew that inference, the prosecution's burden of proof as to the central issue in the case, the identity of the Bautistas' slayer, arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired. Because the People contend, under these circumstances, that the error is harmless under the state harmless-error analysis (People v. Watson (1956) 46 Cal.2d 818, 836), as well as under the more exacting federal standard, which requires us to analyze whether the trial court's error was harmless beyond a reasonable doubt (Chapman v. California (1967) 386 U.S. 18, 24), we shall assume, without deciding, that the Chapman standard is applicable. (Cf. Arizona v. Fulminante (1991) 499 U.S. ___ [113 L.Ed 302, 111 S.Ct. 1246] [federal constitutional "trial error," such as admission of an involuntary confession, is subject to the harmless-error analysis set forth in Chapman].)

In ascertaining the effect of the trial court's error, we consider the potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder. Such evidence invites the jury to be swayed by speculation that, because the defendant previously has murdered, he or she also committed the charged murder. (See Michelson v. United States (1948) 335 U.S. 469, 475-476; People v. Smallwood (1986) 42 Cal.3d 415, 428) Thus, such evidence is inadmissible to establish a defendant's criminal disposition, but is admissible when relevant to another issue, such as opportunity or intent. (See People v. Miranda, supra, 44 Cal.3d 57, 82; see also Estelle v. McGuire (1991) ____ U.S.

____ [112 S.Ct. 475, 483-484] [jury instruction relating to prior-injury evidence did not constitute a "propensity instruction"].)

Unlike the more typical situation, the present case involves other-crimes evidence that was not introduced over the objection of the defense, but rather at its invitation. The defense sought to include such evidence in an effort to persuade the jury of the likelihood that some other member of the drug conspiracy killed Greg Rambo and the Bautistas. This circumstance undoubtedly diluted the probative value of the other-crimes evidence for the prosecution's case, because it was clear the defense desired that the jury consider this evidence for the purpose of establishing defendant's innocence of the charged offenses.

We weigh the foregoing impact against defendant's damning trail of incriminating statements and the circumstantial evidence linking him to the Bautista murders. Larry Tom Whittington, Patricia Shepard, Susan Rambo, and Wayne James each testified as to defendant's confessions. The prosecution presented testimony (of Larry Tom Whittington) that placed defendant at the crime scene on the night of the killings, that established defendant had been arguing with Maureen Bautista, and that defendant had feared she would "snitch him off"; the victims were killed in brutal fashion according to the witnesses who related defendant's confessions – testimony corroborated by the prosecution's forensic testimony, and defendant subsequently went to extreme lengths to conceal the murders, including the removal of his personal effects (and photographs depicting him) from the Bautistas' residence, transportation of the bodies from Bakersfield to Shandon, and burial of the Bautistas' bodies beneath a layer of freshly poured cement. Six days after law enforcement officials exhumed the bodies, defendant falsely identified himself to the officer who arrested him. Viewed against such overwhelming evidence establishing defendant's guilt of the charged offenses, the challenged section of special instruction No. 3, allowing the jury to consider the other-crimes evidence to establish defendant's character, led to a cumulative rather than an unduly prejudicial use of the evidence. We therefore conclude that the trial court's error was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.)

2. Accomplice liability

Defendant contends the trial court committed reversible error when it instructed the jury pursuant to 20 standard jury instructions relating to the subjects of accomplice testimony and conspiracy. Defendant's contention rests upon three distinct arguments: (1) the trial court's instructions represented a "chaotic array" that confused the jury; (2) the trial court misread two instructions; and (3) the trial court erred in rejecting defense counsel's request for a special instruction pertaining to the testimony of an informer.

a. The standard instructions were not confusing

The trial court instructed the jury pursuant to CALJIC Nos. 2.27, 3.10, 3.11, 3.12, 3.13, 3.14, 3.18, and 3.19, which addressed the matter of accomplices, and CALJIC Nos. 6.10.5, 6.11, 6.12, 6.13, 6.14, 6.16, 6.17, 6.18, 6.19, 6.20, 6.21, and 6.22, which addressed the subject of conspiracy. Pursuant to CALJIC No. 17.31, the jurors were instructed that not all instructions necessarily were applicable.

Defendant's argument that the foregoing instructions confused the jury is based upon several contentions, none of which have merit. First, defendant contends the conspiracy instructions were deficient because he was not charged with conspiracy, the instructions thus leaving the jury confused as to what conspiracy could be found. This contention ignores both the evidence at trial suggesting the presence of a drug conspiracy, and the defense theory that the killings were a foreseeable result of that conspiracy. Second, defendant contends the trial court failed to tailor the conspiracy instructions to "conform" to the case, instead allowing the jury to "roam without guidance." Yet this argument ignores both the comprehensive nature of the conspiracy instructions given and the particular instruction to the jury that it should disregard any instruction that applied to facts that the jury determined did not exist. Third, defendant contends the trial court confused the jury by giving instructions on aiding and abetting. Such instructions clearly were proper, however, in view of the evidence that other individuals participated in concealing the murders, thereby raising the possibility that one or more persons might have assisted the killer in perpetrating

these crimes.

Defendant also contends the trial court confused the jury by instructing them pursuant to CALJIC No. 6.20 (withdrawal from conspiracy), even though there was no evidence that any conspirator had withdrawn from the conspiracy. This argument must fail because the presence of a conspiracy was a jury question necessarily embracing issues of who participated in the Shandon drug operation, and when that participation occurred. Moreover, because defendant moved his drug operation from Shandon to Parkfield in December of 1984, a factual issue existed as to whether the Shandon drug conspiracy existed after that move.

Defendant contends the trial court confused the jury in refusing to modify CALJIC No. 6.22, which instructed the jury, in pertinent part, that "Each person in this case is individually entitled to, and must receive, your determination whether he was a member of the alleged conspiracy." Defendant sought to substitute the names of the five key prosecution witnesses for the words "[e]ach person." Defendant's requested substitution obviously would have unduly limited the jury's consideration of who might have participated in the drug conspiracy.

The giving of the accomplice and conspiracy instructions was justified on the basis of the defense's theory that the deaths of Maureen and Telesforo Bautista were the foreseeable result of a conspiracy involving prosecution witnesses. Whether any witness was a member of a conspiracy, whether the murders were a foreseeable consequence of a conspiracy, and whether any witness required corroboration because he or she was an accomplice to the killings were factual matters properly left for the jury's determination. Viewed singularly or collectively, the standard instructions given by the trial court were not confusing. Moreover, any theoretical possibility of confusion was diminished by the parties' closing arguments: defense counsel argued that corroboration was required because the key prosecution witnesses were conspirators, and the prosecution emphasized that the People had shown corroboration if it was needed. There is no indication in the record that the jury sought clarification of the instructions challenged on appeal. We therefore reject defendant's argument that the trial court's instructions confused the jury.

b. The trial court's misreading of CALJIC Nos. 3.19 and 6.10.6 constituted harmless error

In instructing the jury pursuant to CALJIC No. 3.19 (burden to prove corroborating witness is an accomplice), the trial court failed to read the full instruction, the fourth paragraph of which provided: "In the event that the defendant has not proved by a preponderance of the evidence that any witness is an accomplice or the evidence is evenly balanced so that you are unable to say that the evidence on either side of the issue outweighs the other, then you must find that such witness was not an accomplice" The court inadvertently omitted reading the italicized portion of the instruction.

Defendant contends the trial court's error in rendering an incomplete version of CALJIC No. 3.19 violated his right to due process of law. We disagree. The error was harmless, because the jury received the correct version of CALJIC No. 3.19 in its written form. (See People v. Andrews (1989) 49 Cal.3d 200, 216; see also People v. Heishman (1988) 45 Cal.3d 147, 163-165 [trial court's omission of the word "not" from the same sentence in CALJIC No. 3.19 held to be harmless].)[19] Moreover, the trial court's misreading could not have been prejudicial in light of the other instructions given. (See People v. Ghent, supra, 43 Cal.3d at p. 763.)

CALJIC No. 6.10.5 defines conspiracy and explains that, in order to find that a defendant was a member of a conspiracy, there must be proof of an unlawful agreement, specific intent to commit a public offense, and proof of the commission of at least one overt act for the purpose of accomplishing the object of the agreement. Prior to the giving of the instructions, the court agreed to tailor the language in this instruction by replacing the reference to "defendant" wit the word "persons." In instructing the jury pursuant to CALJIC No. 6.10.5, however, the trial court stated, in pertinent part, that "In order to find a person to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the

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19. The current version of CALJIC No. 3.19 omits the sentence here at issue. (CALJIC (5th ed. No. 3.19.)

commission of at least one overt act." Thus, as given by the trial court, the instruction failed to reflect precisely the modification discussed with counsel.

Defendant's contention that the trial court's error violated his right to due process of law is without merit. This technical error did not render the instruction inconsistent with the defense theory of the case, nor did it impermissibly restrict the jury in determining whether any person was a conspirator. (See People v. Lyons (1958) 50 Cal.2d 245, 271.) No prejudice appears.

c. Special instruction A: testimony of an informant

Defendant contends that the trial court erred in refusing to instruct the jury pursuant to special instruction A, which would have cautioned the jury to examine with greater care the testimony of an informer.[20] This instruction was patterned upon the federal rule that requires the giving of a cautionary instruction regarding the testimony of an informant when that testimony furnishes the only strong evidence of guilt. (United States v. Patterson (9th Cir. 1981) 648 F.2d 625, 630-631.) Defendant contends the giving of this instruction was required because the prosecution's case relied upon the testimony of five witnesses who stated that defendant had confessed to the murders.

The federal rule supporting defendant's proposed instruction differs from the law applied in California's state courts.

20. Special instruction A provided:

"The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant." (Citing Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977) § 17.02.)

(Evid. Code, § 411;[21] People v. Alacla, supra, 36 Cal.3d at p. 623.) This court previously has upheld the refusal to give a similar, cautionary instruction regarding the trustworthiness of an immunized witness's testimony. (People v. Hunter (1989) 49 Cal.3d 957, 977-978; see also People v. Payton (1992) 3 Cal.4th 1050, 1059 [rejecting claim that trial court erred in failing to instruct on its own motion that testimony of a jailhouse informant "should be viewed with suspicion and distrust"]; People v. Castro (1979) 99 Cal.App.3d 191, 196-197 [appellate court rejected instruction identical to that proposed here].) The jury in the present case received adequate standard instructions on the credibility of witnesses. (CALJIC Nos. 2.20, 2.21, 2.22, 2.23.) The trial court therefore did not err in refusing to give the special instruction requested by the defense.

3. The trial court's refusal to instruct the jury pursuant to the defense's special instructions pertaining to reasonable doubt and the need to view with caution the testimony relating to defendant's confessions

Defendant contends the trial court committed reversible error in rejecting special instructions, submitted by the defense, pertaining to the reasonable doubt standard of proof and the need to view with caution the testimony relating to defendant's confessions. As we shall explain, we reject defendant's argument.

21. Evidence Code section 411 provides:

"Except where additional evidence is required by statute the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

Enacted subsequent to the present trial, and therefore inapplicable here, section 1127a, subdivision (b), prescribes that, upon the request of a party, the trial court shall instruct that "'The testimony of an in-custody informant should be viewed with caution and close scrutiny. . . .'"

a. Special instruction D: reasonable doubt

Defense counsel proffered special instruction D (set forth in the margin), directing the jury to consider specific evidentiary issues in determining the existence of reasonable doubt as to the identity of the Bautistas' killer.[22] The prosecutor objected on the ground that the

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22. Defendant's special instruction D provided:

"In determining whether reasonable doubt exists as to whether someone other than Mr. Garceau killed Maureen and Telesforo Bautista, you may consider any of the following evidence:

"In whose apartment were they killed?

"Who moved the bodies?

"Who cleaned up the apartment and removed the bodies?

"At whose property were they buried?

"Who had a motive to kill them?

"Who benefitted from their death?

"Who lied to the police about their deaths?

"Who withheld information from the police about their deaths?

(Footnote continued on next page.)

(Footnote continued from previous page.)

"Who arranged for digging the hole in which they were buried?

"Who purchased the cement to cover the bodies?

"Who knew where Maureen's car was hidden?

"Who received immunity to testify?

"Who was seen by neighbors carrying the bodies?

"Who lied under oath in court?

"What is the relationship between all those people who say Mr. Garceau confessed to them?

"Who filed false reports in Greg Rambo's death?

"Who called Greg Rambo's phone asking for him, although knowing he was dead?

instruction was argumentative. Following argument by counsel, the trial court refused the requested instruction, observing that it would confuse the jury and, "for the most part, it is argumentative."

The trial court's ruling was correct. In People v. Wright (1988) 45 Cal.3d 1126, 1135-1138, we rejected a special instruction that similarly pinpointed specific evidence rather than a particular theory of the defendant's case. (See also People v. Daniels, supra, 52 Cal.3d at pp. 870-871; People v. Lucero (1988) 44 Cal.3d 1006, 1020-1021; People v. Adrian (1982) 135 Cal.App.3d 335, 338.) Such an instruction properly is refused as argumentative because it "would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a disputed question of fact, and therefore properly belongs not in instructions, but in the arguments of counsel to the jury." (People v. Wright, supra, 45 Cal.3d at p. 1135; People v. Farmer (1989) 47 Cal.3d 888, 914.) To the extent that special instruction D could be read to embrace stated principles of law involving reasonable doubt, it was repetitious of other instructions given, notable CALJIC No. 2.90, which this court has recognized as "the best available definition of the standard of proof beyond a reasonable doubt." (People v. Crandell (1988) 46 Cal.3d 833, 881; see also §§ 1096, 1096a.) The giving of special instruction D therefore would have confused the jury, and properly was refused on that ground as well. (People v. Farmer, supra, 47 Cal.3d at p. 913.)

"Who had Greg Rambo's wallet, knives and tapes immediately after his death?

"Who had guns last seen with Greg Rambo immediately after Greg Rambo's death?

"Who benefits from having Robert Garceau blamed for the killings of Maureen and Telesforo Bautista and Greg Rambo?

"Whose vehicle was used to move Greg Rambo's body?

"The length of the delay between alleged statements by Garceau and the reporting of those statements by the people who say he made them."

b. Special instruction F: viewing with caution the testimony related to defendant's confessions

Defense counsel proffered special instruction F (set forth in the margin), directing the jury to view with caution the testimony relating to defendant's confessions, and focusing upon specific evidentiary factors relevant to the prosecution witnesses who testified that defendant confessed to committing the Buatista murders.[23/] The

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23. Defendants' special instruction F provided:

"Confession testimony to be viewed with caution.

"Confession testimony has been received in this trial for the purpose of identifying the defendant as the person who committed the crimes charged. The law recognizes that confession testimony is not always reliable, and that cases of false testimony about confessions have been known to occur. You should therefore view confession testimony with caution, and evaluate it carefully in light of the factors I shall discuss.

"Factors to consider in determining credibility of confession testimony[:]

"Many factors can affect the accuracy of confession testimony. In determining the weight to be give the confession testimony in this case, you should first consider the factors I have previously mentioned that may affect confession testimony. (Some are known to you from your personal experiences, while others have been the subject of scientific study and proof.)* Among the more important factors to consider are the following.

"How long did the witness take to report the alleged confession? Did a witness give a report of the confession immediately after the confession was allegedly made?

"Did the witness have a motive to place the blame on the person allegedly confessing?

"Was the witness connected to the crimes by incriminating evidence?

"Was the defendant connected to the crimes by any

prosecutor objected on multiple grounds, among them that the instruction was duplicative and argumentative. The trial court declined to instruct the jury pursuant to special instruction F, ruling that the instruction was objectionable on the latter two grounds. The trial court's ruling was correct. Special instruction F improperly selected certain evidence and implied the weight to be derived therefrom, thus creating the same type of argumentative instruction disapproved in People Wright, supra, 45 Cal.3d at pages 1135-1138. The instruction also was repetitious of the standard cautionary instructions given to the jury in this case (CALJIC Nos. 2.70 and 7.71.7)[24/] and therefore properly was

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evidence other than the alleged confession?

"Was the witness granted immunity, or given any other promise or inducement to testify?

"Did the witness stand to gain financially by placing the blame on the defendant?

[Citation.]"

*In his argument to the trial court, defense counsel offered to eliminate that portion of the proffered instruction enclosed in parentheses.

24. CALJIC No. 2.70, as rendered by the trial court, provided:

"A confession is a statement made by a defendant other than at his trial in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, such a statement must acknowledge participation in the crimes as well as the required criminal intent.

"A statement made by a defendant other than at his trial is not a confession, but an admission, whenever the statement does not, by itself, acknowledge his guilt of the crime for which he is on trial, but which tends to prove his guilt when considered with the rest of the evidence.

"You are the exclusive judges as to whether the defendant has made a confession or an admission and if so whether such statement is true in whole or in part. If you should

refused. (See also People v. Farmer, supra, 47 CAL.3d at p. 913.)

4. The trial court's refusal to instruct the jury pursuant to special instruction H regarding the "Nash testimony," and its decision instead to instruct pursuant to the prosecution's special instruction No. 1

In denying defendant's motion to strike the "Nash testimony," the trial court indicated it would "consider a limiting instruction to the jury. . . ." Both parties thereafter submitted their proposed special instructions pertaining to the admissibility of the "Nash testimony."

Defense counsel proffered special instruction H (set forth in the margin), directing the jury to view the "Nash testimony" only as it might relate to motive.[25] IN response, the prosecutor argued the

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find that a defendant did not make the statement, you must reject it. If you find it true in whole or in part, you may consider that part which you find to be true.

"Evidence of an oral confession or oral admission of the defendant should be viewed with caution."

CALJIC No. 2.71.7, as rendered by the trial court, provided:

"Evidence has been received from which you may find that an oral statement of intent, plan, motive, or design was made by the defendant before the offense with which he is charged was committed.

"It is your duty to decide whether such statement was made by the defendant.

"Evidence of an oral statement ought to be viewed with caution."

25. Defendant's special instruction H provided:

"The testimony regarding Eddie Nash, if believed, is only to be considered by you insofar as it relates to a possible

superiority of its special instruction No. 1 (set forth in the margin), which paralleled a modified version of CALJIC No. 2.50 upheld in People v. Contreras (1983) 144 Cal.App.3d 749, 755-758 [evidence of gang membership].[26] The trial court indicated that special instruction No. 1 would be given, and that special instruction H was refused "as being adequately covered in [s]pecial [i]nstruction No. 1."

Defendant contends the trial court committed reversible error in refusing to instruct pursuant to special instruction H and in giving instead special instruction No. 1. Defendant argues that special

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motive. It is improper to find a person guilty of any offense based on guilt by association."

26. The prosecution's special instruction No. 1 provided:

"Evidence has been received concerning the character and reputation of another witness, Ed Nash, and of defendant's association with that witness. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purposes of determining if it tends to show:

"The identity and motive of the person who committed the crimes, if any, of which the defendant is accused;

"The defendant's state of mind at the time of the crimes charged;

"Corroboration of any other evidence;

"Credibility of any other witness.

(Footnote continued on next page.)

(Footnote continued from previous page.)

"For the limited purposes for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purposes."

instruction H properly countered the prosecution's attempt to establish defendant's guilt through his association with Nash. Defendant further argues that special instruction No. 1 failed effectively to limit the jury's consideration of the "Nash testimony."

We reject defendant's arguments. Defendant's special instruction H was unduly limiting because, a discussed earlier, the "Nash testimony" was relevant not only to the matter of motive, but to the killer's identity and state of mind, and also provided corroboration of other testimony that suggested defendant has been associated with Eddie Nash.

Special instruction No. 1 h=properly allowed the jury to consider the "Nash testimony" for any of the foregoing valid purposes. The instruction also protected defendant by explicitly precluding the jury from considering the "Nash testimony" "to prove that defendant is a person of bad character or that he has a disposition to commit crimes." Such protection was both broader and clearer than the amorphous charge – set fort in defendant's special instruction H – that "[i]t is improper to find a person guilty of any offense based on guilt by association." We discern no error.[27/]

5. Special instruction G: voluntary intoxication

Defendant contends that the trial court committed reversible error in refusing to instruct the jury pursuant to defendant's special instruction G (set forth in the margin), which would have directed the jury to consider the effect of intoxication upon defendant's mental state.[28/] The instruction was a modified version of CALJIC Nos.

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27. In view of our holding that the trial court properly instructed the jury with regard to the limited admissibility of the "Nash testimony," we need not, and do not, reach defendant's alternate contention that the trial court's ruling was prejudicial to defendant at the penalty phase of his trial.

28. Defendant's special instruction G provided:

"If you find from the evidence that at the time the alleged crime was committed, the defendant was intoxicated,

4.21 and 8.77.

At trial, defendant argued that the instruction was warranted on two grounds. First, defendant argued that there was sufficient evidence of defendant's voluntary intoxication to require that the jury be instructed on this subject. Second, even if there was insufficient direct evidence to warrant the giving of this instruction, other evidence establishing defendant's habitual cocaine usage supported an inference that, because defendant freebased cocaine during the morning shortly after the Bautistas were killed, he would have been freebasing cocaine during the evening (or early morning) when these crimes were committed. In response, the prosecution argued that the evidence was insufficient to justify the giving of defendant's proffered special instruction, and that the instruction was inconsistent with the third-party-culpability defense presented by the defendant.

After considering the parties' arguments, the trial court rejected special instruction G on the basis that "there is not sufficient evidence regarding voluntary intoxication at the time of the alleged homicide. For the jury to be instructed on that aspect, it would be

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you must consider what effect, if any, it had on the defendant's forming any of the specific mental states that are essential elements of murder.

"Thus, if as a result of that intoxication you have a reasonable doubt whether he did, maturely and meaningfully, premeditate, deliberate, and reflect upon the gravity of his contemplated act, you cannot find him guilty of a willful, deliberate and premeditated murder of the first degree.

"Also, if as a result of that intoxication you have a reasonable doubt whether he formed the mental states constituting either express or implied malice aforethought and the intent to kill, you cnnnot find him guilty of murder of either the first or second degree.

"If from all the evidence you have a reasonable doubt whether defendant formed such specific intent and mental state, you must give the defendant the benefit of that doubt and find that he did not have such specific intent and mental state."

inviting the jury to speculate and the Court deems that to be inappropriate." The trial court further ruled that defense counsel would not be permitted to argue to the jury that defendant's voluntary intoxication at the time of the killings could negate the mental state required to establish first degree murder. The trial court, indicating it would allow argument as to whether defendant's cocaine usage had a bearing upon whether defendant did in fact act with premeditation and deliberation, stated that defense counsel could argue "the cumulative effect of using cocaine over a period of time[,] should the jury consider whether that had any bearing on [defendant's] conduct."

On appeal, defendant challenges the trial court's finding that there was insufficient evidence to warrant the giving of special instruction G. Defendant cites the testimony of witnesses who describe his prodigious use of cocaine. He also links the testimony of Harlyn Codd, who stated that defendant would become paranoid when engaged in freebasing cocaine, with the testimony of Larry Tom Whittington, who stated that defendant appeared to be exhibiting signs of paranoia when Whittington visited defendant at Patricia Shepard's apartment on the night of the killings. Defendant also links Susan Rambo's testimony that defendant was "hyper" when he freebased cocaine, with her testimony that defendant was "very nervous, hyper, very excited" when he sped into her backyard in September of 1984 and confessed the killings to her. According to defendant, the collective testimony of Codd, Whittington, and Susan Rambo establishes an inference that defendant must have been using cocaine at or shortly before the time of the killings.

We disagree with defendant's characterization of the evidence. There was no evidence introduced at trial that defendant had ingested cocaine at or shortly before the time of the killings. Moreover, Susan Rambo and Larry Tom Whittington each testified that defendant often wen several days without consuming cocaine, thereby refuting defendant's argument that his cocaine usage had been so habitual as to warrant an inference he had ingested cocaine at a time relevant to the Bautista killings.

On this record, the trial court was not obligated to instruct the jury in the manner requested by defendant. (See People v. Ramirez (1990) 50 Cal.3d 1158, 1178-1181; see also People v. Saille (1991) 54

Cal.3D 1103, 1115-1117.) Evidence that a defendant has ingested a drug at some point in time does not equate to usage at the time of the killings. (People v. Williams (1988) 44 Cal.3d 1127, 1143.) Nor does such evidence suggest that defendant suffered impairment related to previous ingestion of cocaine. The paranoia exhibited by defendant concerning "snitches," at the time Larry Tom Whittington visited him at Patricia Shepard's apartment, did not establish that defendant then was ingesting cocaine; the record suggests that defendant was obsessed with "snitches," without regard to whether he was suffering the effects of cocaine intoxication. That defendant may have been "hyper" on the morning he sped into the Ramos' yard, and may have freebased cocaine after his arrival there, similarly does not establish that he had ingested cocaine shortly before the killings (which could have occurred several hours earlier.)

Thus, the trial court's ruling was correct. Evidence of defendant's alleged voluntary intoxication was "'too insubstantial to require submission of the defense to the jury.'" (People v. Williams, supra, 44 Cal.3d at p. 1143 [citing the cases].)

6. Cumulative error

Defendant contends that the cumulative effect of the alleged errors committed by the trial court during the guilt phase requires reversal of his conviction. Having reviewed these alleged errors, we conclude that they were few and generally trivial, and that the only error of significance was the trial court's instruction of the jury pursuant to special instruction No. 3, which, as we have discussed, improperly allowed the jury to consider evidence of defendant's other crimes for the purpose of ascertaining defendant's character. Even when viewed cumulatively, the errors committed fall far below the showing required to warrant reversal based upon cumulative error. Defendant's contention as to cumulative error therefore is without merit.

III. PENALTY PHASE ISSUES

A. Unadjudicated criminal activity

At the penalty phase, the prosecution introduce evidence in aggravation pertaining to defendant's 1982 arrest for the kidnapping of Diane Sems (§ 207) and possession of an explosive device (§ 12303.2), as well as evidence pertaining to his 1981 arrest for possession of a machinegun (§ 12220, subd. (a)) and for being an ex-felon in possession of concealable firearms (former § 12021, subd. (a)). (§ 190.3.)

Defendant contends that the judgment of death must be reversed because the trial court permitted the prosecution to introduce evidence in aggravation pertaining to defendant's unadjudicated criminal activity.[29] His challenge rests upon four distinct arguments, none of which has merit.

First, defendant challenges the admission of evidence involving dismissed charges stemming from his 1982 arrest for kidnapping and possession of an explosive device, and from his 1981 arrest for possession of an explosive device, and from his 1981 arrest for possession of a machinegun and for being an ex-felon in possession of concealable firearms. Defendant argues that the introduction of such evidence violated his state and federal constitutional guaranties to a reliable sentence and to due process of law. He acknowledges that this court previously has rejected similar arguments in People v. Balderas (1985) 41 Cal.3d 144, 204-205, but requests that we reconsider our holding in that case. We decline to do so, observing that we repeatedly have rejected similar constitutional challenges to the admission of unadjudicated crimes. (See, e.g., People v. Pinholster (1992) 1 Cal.4th 856, 973; People v. Jackson (1989) 49 Cal.3d 1170, 1208.)[30]

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29. At the penalty phase, the prosecution also introduced evidence of prior criminal acts by defendant that resulted in conviction: a 1981 conviction for possession of a silencer (§ 12520) and a 1972 conviction for burglary (§ 459). Defendant does not challenge the admission of this evidence.

30. Defendant does not challenge explicitly the admission of his unadjudicated criminal activity on the basis that section 190.3, factor (b), is void for "vagueness." (See Stringer v. Black (1992) 503 U.S. ___ [112 S.Ct. 1130]; see also Bacigalupo v. California (1992) 506 U.S. ___ [113 S.Ct. 32].) To the extent that defendant's challenge can be so interpreted, we reject his claim. (See People v. Tuilaepa (1992) 4 Cal.4th 569, 594-595.)

Second, defendant contends that he should be "deemed acquitted" of his 1981 offenses involving possession of a machinegun and of possession of an illegal weapon by an ex-felon. This contention is not supported by the record. Defendant pleaded guilty to possession of a silencer; the other charges were dismissed without a judicial determination as to their truth or falsity. A bargained conviction or dismissal does not constitute an acquittal under section 190.3. (People v. Heishman, supra, 45 Cal.3d at p. 193; People v. Melton (1988) 44 Cal.3d 713, 755.)

Third, we reject defendant's contention that the unadjudicated criminal activity that occurred in 1981 and 1982 was impermissibly "stale" at the time of defendant's trial in 1987. (See People v. Balderas, supra,41 Cal.3d at p. 202 [§ 190.3, factor (b), imposes no time limitation on introduction of defendant's prior violent criminality]; see also People v. Douglas (1990) 50 Cal.3d 468, 529-530 [evidence of prior violent activity not stale even though it occurred more than seven years earlier]; People v. Heishman, supra, 45 Cal.3d at p. 192 [introduction of evidence under § 190.3, factor (b), is not subject to exclusion on the ground that prosecution for the acts would be barred by the applicable statute of limitations]; People v. Jennings (1991) 53 Cal.3d 334, 388 [same].)

Fourth, we reject defendant's contention that introduction of evidence pertaining to his 1981 crimes was barred by the constitutional guarantee against being placed twice in jeopardy. This guarantee is inapplicable where evidence of prior criminal activity is introduced in a subsequent trial as an aggravating factor for consideration by a penalty phase jury. People v. Melton, supra, 44 Cal.3d at pp. 754-755; see also People v. Taylor (1990) 52 Cal.3d 719, 742-743; People v. Frank (1990) 51 CAL.3d 718, 728-729; People v. Douglas, supra, 50 Cal.3d at pp. 528-529.) We decline defendant's

request to reconsider the applicability of our recent decisions in Melton, and its progeny, to the sentencing phase of a capital case.

B. Other criminal activity and victim-impact evidence

Defendant contends that the judgment of death must be reversed because the trial court, over defendant's objection, admitted the testimony of Diane Sems, who, as described above, related to the penalty phase jury that in 1982 she had been forced into a pickup truck by an acquaintance named Terry Fabricant, blindfolded, and driven by another man to a house she did not recognize. After a few hours, she escaped and contacted the police. The following day, she identified the driver in a photo lineup. At trial, she recalled making a photo identification and, when asked on direct examination whether defendant appeared to be the same man who had driven the pickup truck, she replied, "I think so." On cross-examination, however, she acknowledged she was unsure who had driven the truck. Her identification of defendant (on direct examination) subsequently was corroborated by Phillip Quartararol, the police detective employed by the City of Los Angeles who had shown her the photo lineup, and who testified at trial that Sems had selected defendant's photograph.

Relying upon People v. Phillips (1985) 41 Cal.3d 29, defendant argues that insufficient evidence supported the trial court' ruling admitting Sems's testimony. Defendant also argues that Sems's testimony was irrelevant and inflammatory. (See Booth v. Maryland (1987) 482 U.S. 496; see also South Carolina v. Gathers (1989) 490 U.S. 805.) We reject each of these contentions.

1. The trial court's ruling was supported by substantial evidence

Prior to the admission of Diane Sims's testimony, at defendant's request the trial court conducted a preliminary inquiry outside the presence of the jury to ascertain whether there was substantial evidence to establish that defendant had kidnapped Sems. (See People v. Phillips, supra, 41 Cal.3d 29, 72-73, fn. 25.) Defendant argued that Sems's inability at trial to identify defendant positively as the driver of the pickup truck, and the prosecution's reliance on a prior, out-of-court photo identification, rendered her testimony legally insufficient,

because the evidence did not establish, beyond a reasonable doubt, defendant's involvement in the alleged kidnapping. The trial court overruled defendant's objection and, on appeal, defendant reiterates his challenge.

Notwithstanding Diane Sems's uncertain identification of defendant at trial, her prior photo identification of defendant, made one day after the alleged kidnapping, constituted sufficient evidence to support the trial court's ruling that the prior incident properly could be considered by the jury. (See People v. Lucky (1988) 45 Cal.3d 259, 287-290.) The trial court correctly ruled that Sems's photo identification of defendant was admissible under the prior identification exception to the hearsay rule, codified in Evidence Code section 1238.[31] Contrary to decedent's assertion, the admissibility of evidence pertaining to the alleged kidnapping did not turn upon whether the prosecution could establish beyond a reasonable doubt that defendant was the driver of the pickup truck. (People v. Hendricks (1988) 44 Cal.3d 635, 648.) Rather, the question whether defendant's other criminal activity (including the Sems incident) was proved beyond a reasonable doubt presented a question of fact for the jury. (Evid. Code, § 312; People v. Phillips, supra, 41 Cal.3d at p.72, fn. 25.) At the conclusion of the penalty phase, the trial court correctly instructed the jury that, before it could consider defendant's other criminal activity, the jury had to be satisfied beyond a

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31. Evidence Code section 1238 provides:

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him wile testifying and:

"(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

"(b) The statement was made at a time when the crime or other occurrence was fresh in the witness'[s] memory; and

"(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at the time."

reasonable doubt that the defendant did, in fact, commit such activity. The trial court's ruling as to Sems's testimony was correct, and the evidence properly admitted.

2. Sems's testimony constituted admissible victim-impact evidence

Defendant's challenge to the trial court's admission of Diane Sems's testimony on the ground that her testimony constituted impermissible victim-impact evidence is misplaced. We previously have rejected the argument that Booth v. Maryland, supra, and South Carolina v. Gathers, supra, bar the introduction of evidence relating to "the nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims . . . ." (People v. Benson (1990) 52 CAL.3d 754, 797; see also People v. Edwards (1991) 54 Cal.3d 787, 832-837.) The prosecution was entitled to present testimonial evidence of defendant's violent "criminal activity." (§ 190.3, factor (b); People v. Belmontes (1988) 45 Cal.3d 744, 808-809.) Moreover, the proscription against the use of victim-impact evidence at the sentencing stage largely has been overruled. (Payne v. Tennessee (1991) 501 U.S. ____ [111 S.Ct. 2597, 2608-2611]; see also People v. Thomas, supra, 2 Cal.4th 489, 535.) We therefore conclude that the trial court did not err in admitting Sems's testimony.

C. Weapons evidence

As part of her testimony pertaining to the kidnapping, Diane Sems stated she observed various weapons at the residence where she had been held captive. In corroboration, the prosecution introduced the testimony of Philip Quartararol, the City of Los Angeles police detective, who participated in a police search of the residence shortly after Sems escaped and reported the kidnapping. Quartararol testified that, during his search of the residence, he found two semiautomatic weapons, two shotguns, and "several thousand rounds of ammunition." On cross-examination, Quartararol acknowledged that, under the law in effect at the time he conducted the search in 1982, it was not illegal for

an ex-felon to possess the weapons discovered during the search.[32/]

The prosecution also presented the testimony of Douglas Gerst, a City of Los Angeles police officer, who participated in two police searches of defendant's residence in 1981. Gerst testified that, during these searches, he seized a Mac Ten machinegun (together with a silencer and ammunition he found nearby), six resolvers, two automatic pistols, six rifles, and twelve shotguns. Gerst also testified that "there were thousands of rounds of ammunition throughout the residence." He found mail and utility receipts addressed to defendant at the residence.[33/]

On appeal, defendant contends that the judgment of death must be reversed because the trial court admitted the foregoing evidence involving weapons. Defendant argues that this evidence should not have been admitted, because: (1) the trial court had rejected defendant's request to conduct a hearing pursuant to People v. Phillips, supra, 41 Cal.3d 29, 72-73, fn. 25, to ascertain whether defendant's possession of the weapons constituted a crime; (2) the evidence did not constitute a proper aggravating factor under section 190.3; and (3) introduction of this evidence was highly prejudicial. We reject each of these contentions

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32. The trial court instructed the jury pursuant to special instruction No. 13, which provided, in pertinent part, that the testimony of Quartararol regarding the seizure of weapons and ammunition "may be considered only for the limited purpose of corroborating the testimony of Diane Sems. [¶] You shall not consider, take into account or be guided by that testimony for any other purpose."

33. The trial court instructed the jury pursuant to special instruction No. 11, which provided, in pertinent part, that the jury was to consider Gerst's testimony "only for the limited purpose of determining beyond a reasonable doubt whether the defendant possessed a machine gun, a silencer and handguns with a barrel length of twelve inches or less. You shall not consider, take into account or be guided by that testimony for any other purpose. . . ."

for the reasons set forth below.

1. Defendant failed to preserve the issue

The record does not support defendant's contention that the trial court denied his request for a hearing under Phillips, supra, 41 Cal.3d 29. Rather, defendant requested such a hearing only on the kidnapping issue, discussed, ante, and on the charge that at the time of his 1982 arrest in connection with the Sems incident, he was found to have been in possession of an explosive device. (§ 12303.2.) Defendant's challenge to the weapons evidence was based upon its alleged staleness and the prior dismissal of the weapons charges. Defendant did not request a hearing on the question whether the weapons discovered by law enforcement officers during their searches of his residence constituted criminal activity. Thus, defendant has failed to preserve this issue for review. (Evid. Code, § 353, subd. (a); People v. Mickle (1991) 54 Cal.3d 140, 186; People v. Green (1980) 27 Cal.3d 1, 27-34.)

2. The weapons evidence properly was admitted

Even if defendant had preserved the foregoing issue, our rejection of defendant's argument on the merits would be warranted for two distinct reasons. First, we have held that a hearing under Phillips, supra, 41 Cal.3d 29 may be unnecessary where, as was the case here, substantial evidence establishes each element of the alleged prior offense. (People v. Jennings, supra, 53 Cal.3d 334, 388-389.) Second, the police searches in this case uncovered a machinegun, a silencer beside it, and concealable handguns; defendant's possession of these firearms was illegal. (§ 12021, subd. (a) [possession of a firearm by an ex-felon]; § 12220, subd. (a) [possession of a machinegun].) His possession of such an arsenal clearly involved "the implied threat to use force or violence." (§ 190.3, factor (b); see generally, People v. Ramirez, supra 50 Cal.3d at pp. 1186-1187 [possession of concealed knife at California Youth Authority facility]; People v. Grant (1988) 45 Cal.3d 829, 849-851 [inmate's possession of prison-made shank].) Defendant's possession of a silencer found next to the machinegun strengthens this

conclusion and itself constitutes a felony. (§ 12520.)[34]

3. No prejudice appears

Contrary to defendant's assertion, the introduction of the weapons testimony was not unduly prejudicial. During the guilt phase, the jury had heard that defendant possessed firearms. Susan Rambo had testified that defendant always was armed with a gun. At the penalty phase, the jury properly was advised of defendant's felony conviction for possession of a silencer. Having heard these facts, and already having found defendant guilty of killing Maureen and Telesforo Bautista, the jury was unlikely to have been swayed by the penalty phase testimony of Diane Sems, Douglas Gerst, and Philip Quartararol linking defendant to the possession of various firearms. Any possibility that the jury might have been unduly influenced by this evidence was precluded by the trial court's limiting instructions.

D. Alleged prosecutorial misconduct

Defendant contends that the prosecutor improperly argued several issues to the jury. As explained below, ~~we find this~~ contention to be without merit.

1. Future dangerousness

In his opening statement to the jury at the penalty phase, defense counsel stated that defendant's prison history indicated that

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34. The trial court opined that it may have committed a "de minimis" error in admitting the testimony regarding defendant's lawful possession of rifles and shotguns. With respect to the rifles and shotguns found during the searches conducted in 1981, we agree. But with regard to the search conducted in 1982, testimony regarding defendant's lawful possession of firearms was admissible as a circumstance of the kidnapping. (§ 190.3, factor (b).)

defendant was "what you might call a model prisoner." Counsel also introduced into evidence a document summarizing defendant's successful adjustment to prison life. In response, the prosecutor suggested in closing argument that defendant presented a future danger.

On appeal, defendant contends that the prosecutor's argument pertaining to defendant's future dangerousness was unsupported by the evidence, and therefore violative of defendant's constitutional rights to due process of law and to be free from cruel and unusual punishment. Defendant also contends that the prosecutor's argument mirrored an argument that we held impermissibly urged the jury to view the absence of mitigating evidence as a factor in aggravation. (See People v. Davenport (1985) 41 Cal.3d 247, 288-290.)

We reject these contentions. Defendant's failure to interpose an objection during the prosecutor's argument constituted a waiver of his present claims of error. (People v. Duncan (1991) 53 Cal.3d 955, 976-977; People v. Green, supra, 27 Cal.3d at pp. 27-34.) Even if defendant properly had preserved the issue, his arguments would fail. The prosecutor's argument did not invite the jury to speculate concerning defendant's future dangerousness as a factor in aggravation. (See People v. Malone (1988) 47 Cal.3d 1, 31 [and cases cited therein].) Rather, the argument permissibly was aimed at persuading the jury not to accord significant weight to the defense evidence, proffered in mitigation, that defendant had been (and, presumably, would continue to be) a model prisoner. (See People v. Douglas, supra, 50 Cal.3d at pp. 535-536.) Nor did the prosecutor convert mitigating evidence into aggravating evidence. His statement that there was no evidence suggesting defendant could be rehabilitated, and that defendant posed a threat of violence, constituted fair comments upon defendant's violent criminal past and therefore did not run afoul of Davenport's proscription against arguing the absence of mitigating factors as a factor in aggravation. (See also People v. Bell (1989) 49 Cal.3d 502, 548-550 [comment on future dangerousness is permissible if based upon evidence or inferences drawn from that evidence].) We conclude that the prosecutor's comments regarding defendant's future dangerousness constituted "the sort of vigorous argument a prosecutor is entitled to make." (People v. Thompson, supra, 45 Cal.3d at p. 125; see also People v. Davenport, supra, 41 Cal.3d at p. 288.)

2. Circumstances of the crime

In his closing argument, the prosecutor asked the jury to consider the circumstances of the Bautista killings, and to imagine those crimes from the victims' perspective. On appeal, defendant contends that the prosecutor's argument relied upon speculative inferences, was unsupported by the evidence, and injected constitutionally irrelevant considerations, such as the victims' personal characteristics. Defendant further contends that the prosecutor's remarks were designed to inflame and prejudice the jury by focusing the jury's attention upon Telesforo Bautistia's diminutive stature and emotional attachment to defendant. In defendant's view, the prosecutor's comments regarding Telesforo's physical and emotional vulnerability constituted improper "victim-impact" evidence under Booth v. Maryland, supra, 482 U.S. 496, and South Carolina v. Gathers, supra, 490 U.S. 805.

We reject defendant's contentions. His failure to object below bars appellate review of the issue. (People v. Duncan, supra, 53 Cal.3d at pp. 976-977; People v. Green, supra, 27 Cal.3d at pp. 27-34.) Even if defendant properly had preserved the issue, rejection of defendant's position would be warranted. The prosecutor's comments properly reminded the jury of the "circumstances of the crime." (§ 190.3, factor (a).) The references to Telesforo Bautista's vulnerability reminded the jury that the boy was not one who reasonably could have defended himself, or his mother, against an angry, knife-wielding assailant bent on silencing them both. Thus, Telesforo's slight build, his witnessing of his mother's slaying, and his emotional attachment to her (and to defendant) all served to remind the jury of the cruel and brutal manner of the killings. (See People v. Carrera (1989) 49 Cal.3d 291, 336-337 [likelihood that stabbing victims did not resist attack bore directly upon the manner of the murders and therefore was a circumstance of the crimes].) Nor was it improper for the prosecutor to ask the jury to imagine the crimes from the victims' perspective. (People v. Lewis (1990) 50 Cal.3d 262, 283-284.) The prosecution's request that the jury give consideration to the terror that the victims experienced did not call for speculation or violate Booth and Gathers, but rather was based upon reasonable inferences to be drawn from the evidence. (People v. Marshall (1990) 50 Cal.3d 907, 929; People v. Douglas,

supra, 50 Cal.3d at pp.536-537.) Finally, the prosecutor reminded the jury that he did not seek a verdict based upon passion, but instead urged "a rational verdict based on the law and the evidence."

3. Military service

In his closing argument, the prosecutor briefly referred to defendant's military service.[35/] On appeal, defendant contends that the prosecutor mentioned defendant's military service in Viet Nam in an impermissible manner, attempting to convert mitigating evidence into aggravating evidence. We disagree. Not only did defendant waive this issue by failing to object at trial, but his argument is deficient because it is unsupported by the record. The prosecutor did not argue that defendant's military service was an aggravating factor; rather, the prosecutor argued it was not mitigating. (See People v. Gordon (1990) 50 Cal.3d 1223, 1271-1273 [prosecutor's argument regarding defendant's military service did not convert mitigating evidence into aggravating evidence, but simply illustrated that defendant's actions after leaving the military demonstrated that he had the ability to choose between good and evil, and that he had selected evil].) Moreover, the jury specifically was instructed that it could consider defendant's military service as a mitigating factor.

4. Sympathy

In his closing argument, the prosecutor briefly referred to the

35. The prosecutor stated, in pertinent part:

"A lot of people went to Viet Nam. A lot of people went to Viet Nam; a lot of them didn't come back. Among those who did come back are quadriplegics, people horribly scarred for the rest of their lives, people who nonetheless want to be and have been and surely will continue to be contributing members of this society. They're not kid killers. What is there about his army service, then, that tells you that you should spare his life? His experiences, no doubt, aren't unique. . . ."

jury's opportunity to consider sympathy for the defendant.[36/] On appeal, defendant contends that the prosecutor's argument improperly suggested to the jury that it was precluded from considering, as a factor in mitigation, its sympathy for defendant. We disagree. Not only has defendant failed to preserve this issue, but his contention is unsupported by the record. The prosecutor informed the jury that it could consider sympathy, mercy, and sentiment for the defendant. That the prosecutor suggested defense counsel "no doubt must urge you" to consider sympathy does not imply that defense counsel was only "doing his duty," or that there was no legitimate basis for showing mercy or sympathy to defendant. Defendant's contention is hypertechnical and misconstrues the prosecutor's argument.

E. Miscellaneous contentions

Defendant submits four claims of constitutional error that in recent years have been rejected by this court. They are:

(1) that the 1978 death penalty statute is unconstitutional on its face and as applied, due to its lack of procedural safeguards (People v. Alcala (1992) 4 Cal.4th 747, 809-810, and cases cited therein);

(2) that the trial court erred in instructing the jury pursuant to a modified version of CALJIC No. 8.84.2 (1986 rev.) (the "Brown" instruction [cf. People v. Brown (1985) 40 Cal.3d 512, 538-544]), informing them that in order "[t]o return a judgment of death, each of you must be persuaded that the aggravating evidence or circumstances are so substantial in comparison with the mitigating circumstances that

36. The prosecutor stated, in pertinent part:

"These are brutal savage facts, very raw, but you found them and determined them to be true. Those factors in mitigation, those factors that the defense no doubt must urge you to consider in sparing his life, include the giving of any mercy or any sympathy or any kind of sentimentality to the defendant. The People's response to that is how much did he show to Telesforo? How much mercy did he show to that child?"

it warrants death instead of life without parole" (People v. Marshall, supra, 50 Cal.3d at pp. 933-935; People v. Lewis, supra, 50 Cal.3d at pp. 281-282);

(3) that the trial court erred in failing to instruct the jury pursuant to a special instruction (withdrawn by defense counsel) that would have informed them that a mitigating circumstance need not be proved beyond a reasonable doubt, but that the jury was required to find the existence of a mitigating circumstance if there was any substantial evidence to support it (People v. Bonillas (1989) 48 Cal.3d 757, 789-790);

(4) that the trial court erred in failing to instruct the jury pursuant to a special instruction (withdrawn by defense counsel) that would have informed them that other-crimes evidence could not be considered as evidence in aggravation unless the jury agreed unanimously that the other crime had been proved beyond a reasonable doubt (People v. Allison (1989) 48 Cal.3d 879, 899; see also People v. Thompson, supra, 50 Cal.3d at p. 185).

Defendant fails to persuade us that there is any reason for us to reconsider these recent rulings, and we therefore decline to do so.

F. Cumulative impact of error

Defendant contends that the cumulative impact of error at the guilt and penalty phases of his trial undermined the reliability of the sentencing process, mandating that his death sentence be set aside. We reject this contention. The few errors committed at defendant's trial fail to "raise a reasonable possibility that the jury might have reached a more favorable result had such error or errors not occurred." (People v. Lewis, supra, 50 Cal.3d at p. 285.)[37]

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37. We also note that defendant filed a petition for writ of habeas corpus, contending that defense counsel rendered ineffective assistance of counsel throughout the proceedings, undermining the reliability of the jury's verdicts reached at the conclusion of the guilt and penalty phases of the trial. On September 1, 1993, we denied defendant's petition on the merits. (Mosk, J., was of the opinion that an order to show cause should issue.) (In re Garceau on Habeas Corpus, S022420.)

DISPOSITION

The judgment is affirmed in its entirety.

GEORGE, J.

WE CONCUR:
LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
BAXTER, J.

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PEOPLE v. GARCEAU

S004776 [Crim. 26410]

CONCURRING OPINION BY MOSK, J.

I concur in the judgment. After review, I have found no prejudicial error or other defect.

I also concur generally in Justice George's opinion for the court. In my view, it is substantially sound in reasoning and manifestly correct in result.

I write separately to address defendant's claim that the trial court erred when it instructed the jury that it might consider evidence that he committed crimes other than the charged murders "for any purpose, including but not limited to" "[h]is character or any trait of his character" and "[h]is conduct on a specific occasion . . . ."

I believe that the 'other crimes" instruction was erroneous under California law. It impermissibly allowed the jury to use the evidence in question to infer that defendant was possessed of a bad character or had a disposition or propensity to commit unlawful acts, and that he conducted himself accordingly with respect to the charged murders. It should not have done so. (See, e.g., People v. Hayes (1990) 52 Cal.3d 577, 625 [impliedly approving an instruction that "warned the jury not to consider the other-crimes evidence to prove that [the] defendant was a person of bad character of had a disposition to commit crimes" (italics in original)]; cf. Evid. Code, § 1101, subd. (a) [providing that, as a general matter, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion"].) It goes without saying that a charge of this sort should never again be given.

I shall assume that the "other crimes" instruction was also erroneous under the United States Constitution. The due process clause of the Fourteenth Amendment "protects the accused against conviction

except upon proof [by the state] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (In re Winship (1970) 397 U.S. 358, 364), including, of course, identity. If an instruction lightens the state's burden, it violates due process. (See, e.g., Sandstrom v. Montana (1979) 442 U.S. 510, 520-524.) It is argued that the instruction here effectively did so.

On the assumption that it offends the due process clause of the Fourteenth Amendment, the "other crimes" instruction would be subject to harmless-error analysis under Chapman v. California (1967) 386 U.S. 18. "The Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (Yates v. Evatt (1991) ___ U.S. ___, ___ [111 S.Ct. 1884, 1892].) "To say that an error did not contributed to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question . . . ." (Id. at p. ___ [111 S.Ct. at p. 1893].)

Turning to the case at bar, I am conclude [sic] that the "other crimes" instruction was harmless beyond a reasonable doubt under Chapman.

To be sure, in the general case an instruction allowing the jury to use "other crimes" evidence to infer that the defendant is possessed of a bad character or has a disposition or propensity to commit unlawful acts, and that he conducted himself accordingly with respect to the charged offenses, poses a "'grave danger of prejudice' to [the] accused . . . ." (People v. Thompson (1980) 27 Cal.3d 303, 317.)

This, however, is not the general case. On several occasions and to several persons, defendant confessed that he committed the charged murders. By evidence both physical and testimonial, his confessions were corroborated.

It has been stated that a confession may have an "indelible impact" on the jury, inducing it "to rest its decision on that evidence alone, without . . . consideration of" the rest. (Arizona v. Fulminante (1991) ___ U.S. ___, ___ [111 S.Ct. 1246, 1266] (conc. opn. of Kennedy, J.).)

If even a single confession may have such an "indelible impact," several confessions – as in this case – must practically compel the jury to return a guilty verdict no matter what the other evidence says

or does not say.

Hence, to my mind, the "other crimes" instruction proved to be "unimportant in relation to everything else the jury considered on the issue in question . . . ." (Yates v. Evatt, supra, ___ U.S. at p. ___ [111 S.Ct. at p. 1893].) Therefore, "it appears 'beyond a reasonable doubt that [it] did not contribute to the verdict . . . .'" (Id. at p. ___ [111 S.Ct. at p. 1892].)

Because I have found no prejudicial error or other defect, I concur in the judgment.

MOSK, J.

COPY

PEOPLE v. GARCEAU

S004776 [Crim. 26410]

CONCURRING OPINION BY KENNARD, J.

I concur in the affirmance of the judgment as to both guilt and penalty. I write separately to explain my reasons for concluding that the guilt verdicts should be affirmed even though the trial court erred in instructing the jury that it could consider evidence of the Rambo murder for "any purpose," including defendant's "character or any trait of his character."

In assessing the prejudice to a criminal defendant from an error that permits the jury to consider the defendant's uncharged acts as evidence of character or criminal propensity, this court and the Courts of Appeal have consistently applied the harmless error standard required by our state Constitution (Cal. Const., art. VI, § 13) and articulated in People v. Watson (1956) 46 Cal.2d 818, 836. (See, e.g., People v. Miranda (1987) 44 Cal.3d 57, 83; People v. Alcala (1984) 36 Cal.3d 604, 636; people v. Dominguez (1981) 121 Cal.App.3d 481, 501; People v. Moran (1973) 33 Cal.App.3d 724, 729.) Defendant urges this court to depart from this consistent practice of applying the state harmless error standard and to apply instead the federal standard as described in Chapman v. California (1967) 386 U.S. 18, 24, and further explained in Yates v. Evatt (1991) ___ U.S. ___ [111 S.Ct. 1884].) Defendant maintains that the federal standard is required because the error denied him the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Defendant cites no holding under the federal Constitution prohibiting jury consideration of uncharged crimes to prove criminal propensity. Indeed, the United States Supreme Court just two years ago declined to express an opinion "on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." (Estelle v. McGuire

(1991) ___ U.S. ___, ___, fn. 5 [112 S.Ct. 475, 484, fn. 5].) Nevertheless, defendant argues that the instruction in this case denied him due process of law by permitting the jury to consider irrelevant evidence and by lightening the prosecution's burden of proof. I find neither argument sufficiently persuasive to justify use of the federal test, at least until this court receives more explicit guidance from the United State Supreme Court.

Whether an instruction permitting jury consideration of irrelevant evidence would violate a criminal defendant's right of due process under the federal Constitution is at present unclear. (Compare Estelle v. McGuire, supra, ___ U.S. ___, ___ [112 S.Ct. 475, 481] [". . . we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial"] with Barnes v. United States (1973) 412 U.S. 837, 844-845 ["Common-law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience."]; see also, People v. Castro (1985) 38 Cal.3d 301, 313 (plur. opn.).) For present purposes, I will assume, without deciding, that the federal Constitutional prohibits any state rule that would permit a criminal conviction to be based in whole or in part on irrelevant considerations.

Even so, defendant's argument is defective because propensity evidence is not, as defendant maintains, irrelevant to guilt in a criminal prosecution. Although courts and commentators have given various explanations for the rule excluding propensity evidence, they agree that the evidence has probative value to establish guilt. (See, e.g., Michelson v. United States (1948) 335 U.S. 469, 476; People v. Smallwood (1986) 42 Cal.3d 415, 428; People v. Alcala, supra, 36 Cal.3d 604, 630-631; People v. Thompson (1980) 27 Cal.3d 303, 317; People v. Schader (1969) 71 Cal.2d 761, 772; IA Wigmore on Evidence (Tillers rev. ed. 1983) § 58.1, p. 1211; 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 797-798.) Because propensity evidence is relevant to guilt, its consideration by the jury cannot violate the federal Constitution's implied proscription (assuming there is one) against jury consideration of irrelevant evidence.

The decisions of the United States Supreme Court do not establish that errors of the kind at issue here – that is, violations of state

rules barring jury consideration of evidence that is relevant but unduly prejudicial – contravene the federal Constitution by lightening the prosecution's burden of proof. It is true of course that any trial error that has any potential for prejudicing the defendant makes conviction marginally more likely and in this sense lightens the prosecution's burden of proof. But it cannot be that every such error thereby becomes one of federal constitutional significance. On the contrary, the United States Supreme Court has, in its own words, "'defined the category of infractions that violate "fundamental fairness" very narrowly.'" (Estelle v. McGuire, supra, ___ U.S. ___ [112 S.Ct. 475, 482], quoting Dowling v. United States (1990) 493 U.S. 342, 352.)

The error here did not influence the jury's understanding of either the elements of the charged offenses or the prosecution's burden of proof. Therefore, I am not persuaded that the error lightened the prosecution's burden of proof in a manner constituting a federal constitutional violation.

Having concluded that the argument for federal constitutional error is insubstantial, I would continue to apply our state harmless error standard, under which a judgment will be reversed for error only when, after an examination of the entire cause including the evidence, the reviewing court is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (People v. Watson, supra, 466 Cal.2d 818, 836.) Applying this standard here, I find the error harmless.

The majority reasons that the error was not prejudicial because the prosecution presented "overwhelming evidence establishing defendant's guilt of the charged offenses[.]" (Maj. opn., ante, at p. ___ [typed maj. opn. at p. 60.) But, as defendant points out, the strength of the prosecution's evidence in this case depended upon the credibility of the prosecution's witnesses who testified to defendant's confessions and admissions. Each of these witnesses participated to some extent in the drug operation, and exposure of the drug operation thus threatened each of them, just as it threatened defendant. The charged murders occurred in the apartment of one of these witnesses (Patricia Shepard) and the victims' bodies were buried at the residence of another witness (Susan Rambo). A third witness (Larry Tom Whittington) admittedly participate din moving the bodies and concealing evidence of the

murders. None of the witnesses came forward until long after the murders had occurred, and all had ample time to prepare and coordinate a story placing the blame on defendant. Evidence that depends on the credibility of such witnesses can hardly be deemed overwhelming.

Nevertheless, I am satisfied that defendant was not prejudiced by the court's instruction permitting the jury to consider the Rambo murder as propensity evidence. The instruction could prejudice defendant only if the jury first determined that it was defendant who had killed Rambo, then inferred from this killing that defendant was a violent person capable of murder, and finally used this inference about defendant's character to conclude that defendant committed the charged offenses. But the evidence identifying defendant as Rambo's killer, like the evidence identifying defendant as the perpetrator of the charged murders, consisted primarily of the testimony of other members of the drug ring, with little or no physical evidence tying defendant to the crime. To conclude that defendant had killed Rambo, the jury would have had to find the prosecution's witnesses credible. If the jury believed them as to Rambo's murder, it would almost inevitably believe them as to the charged murders as well.

This analysis is consistent with the defense strategy. The defense recognized that the credibility of the prosecution's witnesses was the key issue – virtually the only issue – in the case. The defense did not oppose admission of the Rambo murder evidence because it viewed that evidence as less credible then the evidence of the charged murders. Thus, the defense was counting on the jury to disbelieve the prosecution's witnesses as to the Rambo murder, and by this means to undermine their credibility as to the charged murders.

Given the nature of the credibility contest presented to the jury, it is highly unlikely that the jury in reaching its guilt verdicts relied to any significant degree on inferences about defendant's character drawn from the Rambo murder. For this reason, it is not reasonably probable that the jury would have returned a verdict more favorable to defendant had the trial court not given the erroneous instruction.

KENNARD, J.

PEOPLE v. ROBERT FREDERICK GARCEAU

S004776

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TRIAL COURT: Kern County Superior Court

TRIAL COURT #: 29601

The information provided here is not intended to reflect that which will appear in official reports.

28 U.S.C.A. § 2241

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

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Current through P.L. 107-185, approved 5-30-02
(except P.L. 107-171)

§ 2241. **Power to grant writ**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by

a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C.A. § 2242

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS
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(except P.L. 107-171)

§ 2242. **Application**

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known. It may be amended or supplemented as provided in the rules of procedure applicable to civil actions. If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C.A. § 2243

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§ 2243. **Issuance of writ; return; hearing; decision**

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless

it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C.A. § 2244

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§ 2244. **Finality of determination**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas

corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be

filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2245

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§ 2245. **Certificate of trial judge admissible in evidence**

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

28 U.S.C.A. § 2246

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§ 2246. **Evidence; depositions; affidavits**

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 U.S.C.A. § 2247

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§ 2247. **Documentary evidence**

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

28 U.S.C.A. § 2248

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§ 2248. **Return or answer; conclusiveness**

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

28 U.S.C.A. § 2249

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§ 2249. **Certified copies of indictment, plea and judgment; duty of respondent**

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

28 U.S.C.A. § 2250

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§ 2250. **Indigent petitioner entitled to documents without cost**

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

28 U.S.C.A. § 2251

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§ 2251. **Stay of State court proceedings**

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

28 U.S.C.A. § 2252

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§ 2252. **Notice**

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

28 U.S.C.A. § 2253

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§ 2253. **Appeal**

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2254

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Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2254. **State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the
State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State

court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except

as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C.A. § 2255

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 153--HABEAS CORPUS

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Current through P.L. 107-185, approved 5-30-02 (except P.L. 107-171)

§ 2255. **Federal custody; remedies on motion attacking sentence**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

JEANNE WOODFORD, Petitioner,

v.

ROBERT FREDERICK GARCEAU, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

DEATH PENALTY CASE

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No. 01-1862

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OCTOBER TERM, 2001

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TO THE UNITED STATES SUPREME COURT

RESPONDENT'S MOTION

FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

DEATH PENALTY CASE

Pursuant to United States Supreme Court Rule 39, Respondent Robert Frederick Garceau ("Respondent") hereby respectfully seeks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs, and to proceed in this matter *in forma pauperis*.

Respondent is an inmate in the California State Prison at San Quentin. In an Order filed June 26, 1995, the United States District Court for the Eastern District of California appointed Denise Kendall, Esq. and the California Appellate Project as co-counsel to

represent respondent under 21 USC § 848 (q)(4).

Counsel of record, Lynne S. Coffin, was substituted for the California Appellate Project as counsel by the United States District Court for the Eastern District of California as counsel for Respondent on October 13, 1995.

DATED: 7/23/02

Respectfully submitted,

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No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

JEANNE WOODFORD, Petitioner,

v.

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ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DEATH PENALTY CASE

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STATEMENT OF FACTS

To the extent that Petitioner accurately describes the factual history of this case, Respondent incorporates Petitioner's Statement of the Case. However, Petitioner repeatedly blurs, avoids, and even misstates critical parts of the factual background in order to garner support for their argument. To this extent, Respondent clarifies and accurately restates specific facts of this case.

In an attempt to demonstrate that the provisions of the Antiterrorism Effective Death Penalty Act (AEDPA) govern the case at hand, Petitioner alleges in the procedural history incorporated into their argument that "the appointment of counsel and request for stay of execution was uncontested in this case." Pet. at 9, n. 4. This statement is untrue. In fact, the motion for appointment of counsel and request for stay of execution was fully contested.[1] Petitioner makes this misstatement to support the argument that because Respondent's case involved no adversity prior to the filing of the petition, it did not constitute a "pending case" as defined by the AEDPA and that the AEDPA therefore applies. Petitioner's misstatements are

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[1] On May 2, 1995, the Court issued a Notice of Hearing. On May 12, 1995, the court issued an Order Staying Execution and All Proceedings. On May 12, 1995, Respondent filed an Ex Parte Application for Stay to Permit Appointment of Counsel and Notice of Intention to File Petition For Writ of Habeas Corpus. On June 26, 1995, the court issued an Order Appointing Counsel and Temporary Stay of Proceedings. On August 1, 1995, Petitioner filed a Notice of and Motion to Vacate Stay of Execution. On August 14, 1995, Respondent filed a Specification of Non-Frivolous Issues (incorporating arguments surrounding the improper use of peremptory challenges, and prosecutor misconduct at penalty phase.) On August 15, 1995, Respondent filed Opposition to Motion to Vacate Stay of Execution. On September 19, Respondent Filed Supp. Decl. of Lynne S. Coffin Filed in Support of Petitioner's Opp. to Motion to Vacate Stay of Execution. On October 13, 1995, Court Issued Order Denying Motion To Vacate Stay Of Execution Appointing Counsel, Setting Dates. On November 8, 1995, the court issued an Order Granting An Extension to File Case Budget and Stay of Execution. On December 19, 1995, the court issue an Order Requiring Filing of Petition For Writ of Habeas Corpus and Answer. On June 4, 1996, Petitioner filed their Opposition to Temporary Stay to October 7, 1996 Proposed Order Staying Execution. On June 26, 1996, Respondent filed an Ex Parte Application and Order for Stay of Execution Pending Final Disposition of Habeas Corpus Petition. On July 2, 1996, Respondent filed their Petition for Habeas Corpus. *See* App. G-S.

inadequate attempts to distinguish this case from the precedents favoring Respondent. Petitioner's argument that this case is proper for certiorari review fails to convince due to the limited and finite number of cases to be affected by this waning issue. Moreover, the effect of any outcome of this case is limited since Respondent is already facing another term of thirty two years to life imprisonment.[2]

Petitioner further misleads this Court in the second part of their argument. Although Petitioner admits in the first sentence of their *Teague* [3] argument (Pet. at 12) that "[t]he State did not raise *Teague* until the petition for rehearing filed in the Ninth Circuit and now in the petition for certiorari," Petitioner then proceeds to state that the court, despite "clear notice," failed to apply *Teague*. Pet. at 10; *see also* the court "was expressly on notice" (Pet. at 13), where the court is "expressly on notice" (Pet. at 13), and where "a federal court is on notice" of *Teague* (Pet. at 13). Although Petitioner's initial statement admits that the State did not raise *Teague* in either the district court or on appeal, Petitioner still manages to imply that the Court was somehow "on notice" of *Teague* other than by the fact that the court sua sponte raised *Teague*.

Apart from these improper implications and misstatements of the factual background of this case, Respondent incorporates the factual history of this case as accurately portrayed by Petitioner.

SUMMARY OF ARGUMENT

Both of the issues that Petitioner lays before this Court are wholly inappropriate for certiorari review.

Petitioner first alleges that the court of appeals incorrectly held that this case was pending before the enactment of the AEDPA. The court of appeals decided this issue in line with numerous holdings of this Court. Moreover, given the fact that the issue of what constitutes a

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[2] Respondent was convicted of first degree murder and other crimes and sentenced to prison for a term of 32 years and four months to life. *See* App. T-U.

[3] *Teague v. Lane*, 489 U.S. 288 (1989).

"pending" case under the AEDPA is soon to be a moot issue, this Court should not disturb the numerous holdings of the circuit courts in order to rule on the dwindling number of cases which remain. Given the fact that this issue is soon to become irrelevant, Petitioner's portrayal of this issue as having important consequences is simply unsupportable.

Petitioner also argues that the court of appeals abused its discretion in failing to apply *Teague*. Petitioner ignores the numerous holdings of this Court stating that when the state fails to argue *Teague* until its Petition for Rehearing and Petition for Certiorari, that Petitioner has waived *Teague*, and that the court, under those circumstances, has discretion whether to apply *Teague*.

REASONS FOR DENYING THE WRIT

I. This Court Should Deny The State's Petition For Writ Of Certiorari Because It Is Neither An Appropriate Matter Nor A Matter Of Sufficient Importance For Certiorari Review

This issue is not proper for certiorari review for at least three reasons. One, this Court has already decided this issue, and the holding of the Ninth Circuit in *Calderon v. United States District Court (Kelly),* 163 F.3d 530 (9th Cir. 1998)(*en banc*) and the cases it relies on is both correct and in conformity with this Court's prior decisions. Second, this case finds itself in a highly unusual procedural posture, and the number of similar cases to be affected by this issue is both limited and finite. This issue simply lacks vitality. Therefore, this is not an area of law in need of this Court's authoritative voice, and were this Court to let this issue stand, the national impact would be minimal.[4] Third, however, if this Court were to consider this question, any manner by which this Court decided the issue would result in chaos in the courts. For these reasons, this is neither an appropriate matter nor a matter of sufficient importance for this Court to consider on certiorari review. This Court should deny Petitioner's Writ for Grant of Certiorari.

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[4] This Court has previously decided that this exact issue does not merit review. *See Kelly v. Calderon*, 523 U.S. 1063 (1998), *cert denied.*

A. The Unusual Procedural Posture Of This Case, The Limited Number Of Cases To Be Affected By This Issue, And The Chaos That Would Result If This Issue Were Considered, Make This Case Inappropriate For Certiorari Review

This case is in a highly unusual procedural posture, and is simply not fit for certiorari review. Petitioner argues that since other pre-AEDPA cases remain, that this Court must consider this issue. However, this issue lacks vitality. The actual number of cases to fall into this situation are both few and finite. The atypical history which affects Respondent only occurs where the filing of the petition was on or after April 24, 1996 (post-enactment of the AEDPA), but where there was a Motion for Appointment Of Counsel and Stay of Execution prior to the enactment of the AEDPA. Moreover, in order for this to be an issue that the state would contest, given the less onerous standard under pre-AEDPA legislation, it would have to be a case where the circuit court ruling was in the defendant's favor. Particularly given the fact that at the time the AEDPA legislation was pending, defense attorneys were advised to file their petitions quickly, at this late point in the day, there are bound to be very few cases which fall into this unusual procedural posture. As a result, few, if any, cases will follow in the path of *Garceau*. The issue in *Kelly*, therefore, is a matter which does not merit review on certiorari, due to the finite and rapidly decreasing number of cases to be affected. The mere passage of time will render this issue moot.

Given the minimal national impact of letting this issue stand, this is clearly not an area of law in need of this Court's authoritative voice. On the other hand, the result of this Court considering this issue would be to create havoc in the courts. Any way that this Court decided the issue would result in procedural chaos. If this Court were to agree with Petitioner and find against Respondent, a major issue would develop as to what should be done with the cases which have found themselves in this position. Would they be sent back to the circuit court for review? Would they be sent back to the district court for review? All of the cases in this position would have to be reheard and the circuit court would have to develop and implement a procedural

mechanism to deal with these cases and organize this process. If the district court had treated a case as not falling under the AEDPA, and the circuit court then treated the case as under the AEDPA, total confusion would result. Moreover, if the Court were to disagree with Petitioner, numerous cases would have to be reheard. Such a ruling would result in complete chaos within and between the circuits. And the entire point of having created such confusion and havoc in the courts, would simply be to rule on an issue which is quickly disappearing. Even the cases cited by Petitioner admit that "once all cases in which a petitioner initiated some habeas corpus-related legal action prior to the effective date of the AEDPA have been resolved, the point at which a section 2254 case is filed will become irrelevant." *Williams v. Coyle*, 167 F.3d 1036 (5th Cir. 1999). Petitioner's portrayal of this issue as having important consequences is specious and unsupportable. Petitioner's Petition for Writ of Certiorari should be denied on these grounds alone.

B. The Circuit Court Of Appeal Correctly Decided, In Accordance With The Prior Decisions Of This Court, That This Case Was Pending Before The Enactment Of The AEDPA

Petitioner wrongly alleges that the Ninth Circuit applied the incorrect trigger event for the application of the AEDPA and that this case was not pending before the application of the AEDPA. The court of appeal, in accordance with prior decisions of this Court, has found that the AEDPA does not apply to a federal petition filed on or after April 24, 1996 if there is a motion for appointment of counsel and stay of execution filed prior to that date. *Calderon v. Kelly*, 163 F.3d 530 (9th Cir. 1998, en banc). That court correctly held in *Kelly* that there are two steps that suffice to commence habeas corpus proceedings: one, by filing a habeas corpus petition accompanied by an application for a stay of execution, or two, as endorsed in *McFarland v. Scott*, 512 U.S. 849 (1994), by filing an application for appointment of counsel accompanied by an application for a stay of execution. *Calderon v. Kelly*, 163 F. 3d 530. Petitioner incorrectly argues that the only triggering event for the application of the AEDPA is the filing of the habeas petition. The decision of the circuit court in *Kelly* is in accord with the holdings of this Court, as

reflected by the fact that this Court in *Kelly* previously declined to consider this issue on certiorari review. *Kelly v. Calderon,* 523 U.S. 1063 (1998), *cert denied.*

This Court has held that the AEDPA's provisions do not apply to "cases pending" at the time of the statute's enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997). In determining the meaning of "cases pending," *Kelly* relied on this Court's holdings in *Lindh, Hohn v. United States*, 524 U.S. 236 (1998), and *McFarland.* Although the opinion of the majority in *Kelly* was consistent with the prior line of decisions of this Court, Petitioner argues that the dissent in *Kelly* provides the basis for rejecting the approach taken by the majority with regard to the trigger date of the AEDPA. Petitioner's argument has two main themes. First, Petitioner disputes equating the word "case" as used in *Hohn* with the meaning of the word "case" for purposes of determining whether the provisions of AEDPA apply. Pet. at 7. Petitioner cites the dissent from the majority reasoning in *Kelly,* stating that where a petition has not been filed, there is "nothing that could remain a case." Pet. at 8, citing *Calderon v. Kelly*, 163 F.3d 545. Petitioner also cites the dissent in *Kelly* in support of the second prong of their argument that the holding in *Hohn* is distinguishable from the present facts since a certificate for appealability, as in *Hohn,* involves adversity that the current facts do not. Petitioner bases this argument on the notion that since a stay of execution is *"usually"* granted and since appointment of counsel is "*mandatory,*" and since in the specific facts of this case, the appointment of counsel and request for stay of execution were "*uncontested,*" that no case had been initiated before the enactment of AEDPA. Pet. at 8-9.

Petitioner's argument is meritless on several grounds. Petitioner cannot claim that these proceedings are not and were not adversarial in nature. The grant or denial of a stay of execution is addressed to the *discretion* of the district court, and "is not a ministerial or mandatory act." *Calderon v. Kelly*, 169 F.3d 540. This Court has made clear that capital defendants must raise at least some colorable federal claim before a stay of execution may be entered. *McFarland v. Scott,* 512 U.S. 861. Moreover, as demonstrated above, Petitioner misstates the facts of this case. In August 1995, almost a year before the enactment of the AEDPA, the Motion for Stay of Execution *was* fully litigated. *See supra,* n.1; *see* App. G-S. For Petitioner to argue that the request for stay of execution was uncontested is demonstrably false. Further, Petitioner's attempt

to distinguish *Hohn* on the grounds that because the appointment of counsel is mandatory, a stay of execution will usually be granted is equally inappropriate. The appointment of counsel is not mandatory and could involve adversarial proceedings, although it did not in fact do so in this case.

In addition, Respondent filed, what was at the time required, a Specification of Non-Frivolous Claims, outlining Respondent's specific habeas claims. *See* App L. These claims included allegations of improper use of peremptory challenges, and prosecutorial misconduct at penalty phase. Contrary to Petitioner's argument, by detailing the habeas claims in the Specification of Non-Frivolous Issues, there was clearly something that "could remain a case." The true facts of this case, as misstated and avoided by Petitioner, diffuse the majority of Petitioner's argument which is largely based on a claim that there was no adversity in this case prior to the filing of the petition and nothing that could remain a "case."

Moreover, the decision in *Kelly* is correct and is in harmony with the other decisions of this Court. The cases cited by Petitioner demonstrating a circuit split argue that *Hohn* only stands for the proposition that a motion for appointment of counsel constitutes an appealable case, and that this does not imply that a habeas corpus case has been initiated by the filing of such a preliminary motion. *Williams v. Coyle*, 167 F.3d 1040 (5th Cir. 1999). However, this Court's decision in *Hohn* rejected the contention that the filing of a preliminary motion constituted a threshold inquiry that should be regarded separate from the merits.[5] The tie that binds *Hohn* and *Kelly,* therefore, is that neither an application for appointment of counsel nor an application for a certificate of appealability should be regarded as threshold matters, separate from the merits, but rather as judicial proceedings to resolve cases or controversies.

Petitioner is muddying clear waters. This Court in *McFarland* held that a habeas proceeding is "commenced" by the appointment of counsel. *McFarland v. Scott*, 512 U.S. at

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[5] Moreover, as the dissent in *Williams* argued, given the fact that Congress recognized the need for counsel to prepare the petition for the writ, requiring the actual filing of the petition for the commencement of the proceedings may effectively "deny uneducated, poor petitioners their remedy. The filing of a motion for appointment of counsel is as much as many such petitioners can accomplish without the assistance from an attorney." *Williams v. Coyle,* 167 F.3d 1041; *see also McFarland v. Scott,* 512 U.S. 849.

856-857. Reading U.S.C. section 848 (providing for legal assistance in pre-application capital federal habeas corpus proceedings) and U.S.C. section 2251 (allowing a federal court to enter a stay of execution when a habeas corpus case is "pending") together, the *McFarland* court held that a "case" is "pending" if there is appointment of counsel. *McFarland v. Scott*, 512 U.S. at 858. The "proceeding...pending" language of Chapter 153's stay provision cannot be meaningfully distinguished from the "cases pending" language of section 107(c), which as *Lindh* concluded, "implicitly" governs the applicability of "the amendments to chapter 153." *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).[6] That analysis is reenforced by the Court's decision in *Hohn* that a preliminary pleading filed in a court should be treated as an indivisible part of the overall "case," and which confirmed the analysis in *McFarland* by equating "case" with "proceeding." *Hohn v. U.S.*, 524 U.S. 236. These decisions of this Court led the circuit court to properly conclude in *Kelly* that a petition for appointment of counsel, coupled with a motion for stay of execution, constituted a "pending case."

Although Congress used the word "application" throughout the AEDPA, Congress did not prescribe that the retroactivity dividing line was between "applications" or "petitions" that were "filed" and "applications" or "petitions" that were "not filed." Rather, Congress prescribed that the dispositive consideration was whether there was a "case pending" as of the AEDPA's enactment. The reason Congress chose to use the broader term "cases pending" in section 107(c), the retroactivity provision, instead of the term "application" or "petition," is clear. As this Court had recently held in *McFarland*, although habeas proceedings can be initiated only by the filing of a petition or application, capital habeas proceedings can be commenced by the filing of a request for appointment of counsel pursuant to 21 U.S.C. section 848. By using the words "cases pending," Congress opted for a term that would encompass both methods of initiating habeas corpus proceedings.[6] Moreover, as this Court held in *Hohn*, the words "case" and "cause"

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[6]There is no basis whatsoever to merely assume that Congress was sloppy in its drafting. *See Keene Corp. v. United States,* 508 U.S. 200 (1993) [it is generally presumed that Congress acts intentionally and purposely in using different language in different parts of a statute]. That the terms "cases" and "applications" are not synonymous is confirmed by the fact that they have

are constantly used as synonyms in statues, and that "case" as used in a statue, means a court proceeding, suit, or action. *Hohn v. U.S.*, 524 U.S. 241 (1998); *see also United States v. Brown*, 206 U.S. 240 at 244 (1907) [we must "accept the plain meaning of words"]. Congress's choice of the word "cases" rather than "petitions" or "applications" in section 107(c) harmonized perfectly with this Court's then-recent decision in *McFarland.*

Moreover, this Court's holding in *Slack v. McDaniel*, 529 U.S. 473 (2000) provides further support for the *Kelly* position that a pre-AEDPA *McFarland* application for appointment of counsel triggers the application of pre-AEDPA law. *Slack* holds that an "application for Certificate of Appealability" "commences" an "appellate case" because it "initiates" "proceedings in appellate courts," and "we have described proceedings in the court of appeals as appellate cases." *Id.* at 481-482. Because a *McFarland* application for appointment of counsel similarly "initiates" "proceedings" in the district court, such a filing should be understood to commence a "case" in the district court for purposes of determining the AEDPA's applicability to the district court proceedings. In order for this Court to find for Petitioner and grant this petition for certiorari, this Court would have to find that although a habeas corpus "proceeding" is "commenced," and although a habeas corpus "proceeding" is "pending," that a habeas corpus "case" is not "pending." That is an untenable position for which there is no support. This Court has already decided this issue in *McFarland*, and would have to depart from that holding in order to find for Petitioner in this case.

This Court has repeatedly held that reliance and the reasonable expectations of individual litigants are of paramount concern in assessing the retroactivity of a statute. *Martin v. Hadix*, 527 U.S. 343, 358 (1999); *Lindh v. Murphy*, 521 U.S. at 327-28. This Court's cases stand for the principle that there is a reasonable expectation of parties that once a case develops to a certain point in the litigation that the parties will or will not be covered by the legislation in question, as such a determination clearly affects the decision-making in the litigation. For this reason, this

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obviously different meanings in the four places in the AEDPA where they are directly juxtaposed. *See* e.g. 28 U.S.C. section 2262(c) (limiting a habeas court's "authority to enter a stay of execution in the *case* unless the court of appeals approves the filing of a second or successive *application*" (emphasis added); See also, section 2266(b)(1)(a) and (c)(1)(a) and 2263(b)(3)(a).)

Court held in *Lindh* that the amendments to the habeas corpus provisions would not apply to "cases pending" before the effective date of the AEDPA.

The decision in *Kelly*, and its application in *Garceau*, is in keeping with this Court's prior decisions in *McFarland*, *Lindh*, and *Hohn*. These cases were correctly decided and this Court should not now depart from these holdings to decide what is now a vanishing issue.

II. This Court Should Deny Petitioner's Petition For Writ Of Certiorari Because In The Face Of The State's Waiver Of *Teague*, The Court Of Appeals Correctly Exercised Its Discretion Not To Apply *Teague*

Petitioner wrongly alleges that the court below abused its discretion in failing to apply *Teague v. Lane* 489 U.S. 298 (1989) where the state failed to argue *Teague* both in the district court and on appeal. When the State waives *Teague*, the court has discretion whether or not to apply a *Teague* analysis, which is exactly what the court of appeal did here. Moreover, given the specific facts of this case, the court of appeals properly exercised its discretion in declining to apply *Teague*.

A. When The Court of Appeals Panel Unanimously Considers And Determines In Their Discretion Not To Apply *Teague* When It Was Never Raised By The State, There Is No Abuse Of Discretion

Petitioner wrongly alleges that despite clear notice as to the possible application of *Teague*, the court of appeals ignored *Teague*, and in doing so abused its discretion and demonstrated a split in the circuits' approach to *Teague*. Pet. at 10. Every aspect of Petitioner's argument fails to withstand scrutiny. Petitioner is essentially asking this Court to ignore well established legal principles and find that when the lower court is "on notice" of *Teague*, it is an abuse of discretion not to always apply *Teague*. Petitioner argues that this is an important issue to be decided by this Court. Pet. at 13. However, Petitioner ignores the fact that this Court has already decided this issue in *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), and has just recently

reaffirmed this decision in *Horn v. Banks*, 122 S.Ct. 2147 (U.S. June 17, 2002), by holding that when the state fails to argue *Teague*, there is no duty on the court to apply it. Petitioner misleads this Court by arguing that the court was "on notice" of *Teague*, rather than admitting the lower court considered *Teague* and exercised its discretion in not applying it. In fact, the only real issue is whether Petitioner raised and argued *Teague*, not whether the court of appeals of its own fruition mentioned and considered *Teague*. Moreover, where as here, Petitioner wholly failed to argue *Teague*, this Court has repeatedly made clear that there is no duty on the court to apply *Teague*.

Petitioner also alleges that there is a conflict of decisions between the circuits with regard to when to apply *Teague*. Although there is no direct circuit split, to the extent that one may have developed, this Court has just reaffirmed in *Horn* that in the face of *Teague*-waiver by the state, whether to apply *Teague* sua sponte is a matter for the court's discretion. Therefore, this Court has just decided this exact issue, leaving nothing for this Court to consider in the present case. For all of these reasons, Petitioner's Petition for Writ of Certiorari should be denied.

In line with a consistent string of decisions from this Court, this Court has just held in *Horn* that a federal court hearing a habeas petition may decline to apply the *Teague* doctrine if the state does not argue it, but that if the state does argue that the defendant seeks the benefit of a new rule of constitutional law, that the court must apply *Teague* before considering the merits (affirming this Court's prior decisions in *Caspari v. Bohlen*, 510 U.S. 389 [a "federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim"], *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), and *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994).) Therefore, if the state argues *Teague*, the court has a mandatory duty to apply a *Teague* analysis; if the state fails to argue *Teague*, it is in the court's discretion whether or not to apply *Teague*.

This Court's recent decision in *Horn* is in line with repeated decisions of this Court which have held that the burden of asserting non-retroactivity belongs to the state and not to the federal courts sua sponte. *Hopkins v. Reeves*, 524 U.S. 88, 94 (1998). Although the court raises and applies *Teague* sua sponte when the court believes it is appropriate to do so (*Saffle v. Parks*, 494

U.S. 484 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999); *Spazino v. Singletary*, 36 F.3d 1028, 1041-1042 (11th Cir. 1994)), *Teague* is not a jurisdictional issue, and this Court has repeatedly held that when the state fails to argue *Teague*, it is in the Court's discretion whether to apply *Teague*. *Horn v. Banks*, 122 S.Ct. 2147 (U.S. June 17, 2002); *Caspari v. Bohlen*, 510 U.S. 390; *Schiro v. Farley*, 510 U.S. 228-229; *Collins v. Youngblood*, 497 U.S. 41; *see also Ciak v. U.S.*, 59 F.3d 296, 302-303 (2nd Cir. 1995). Although *Teague* is a heightened affirmative defense to the extent that the Court may raise it sua sponte, like other judicially extended affirmative defenses, the duty is still on the state to assert it before it is incumbent on the court to consider it.

Although the state regularly raises *Teague*, the state can waive *Teague* for whatever reason it chooses, and in fact did so in this case. Petitioner failed to raise *Teague* in the district court and again on appeal. Even when the court of appeals specifically raised the issue of *Teague* at oral argument, Petitioner still failed to argue *Teague* and gave no explanation for its failure to raise it. In fact, the circuit panel was unanimous in its refusal to apply *Teague*. Justice O'Scannlain stated in his dissent from the merits of the decision,

> I would hesitate to forego a *Teague* analysis if the state had only implicitly waived *Teague* by failing to raise it in his briefs.... The state, though, went one step further. Asked at oral argument whether *Teague* applied to this case, counsel for the state lamely replied, "*Teague* has never been raised in this case." When pressed from the bench, and given an opportunity to raise *Teague*, counsel impotently responded, "I don't know why *Teague* has never been raised in this case," but did not in fact raise it.

See App. A.

Although Petitioner claims it did not expressly waive *Teague* (Pet., n.7), the facts show otherwise. Not only did Petitioner fail to raise and argue *Teague*, which in itself constitutes waiver sufficient to relieve the court of its duty to apply *Teague* as a threshold issue, but as even the dissent agreed, Petitioner expressly waived *Teague* when put on notice at oral argument of its possible application and still failed to raise *Teague*. In fact, Petitioner still has not given any explanation for why they have not raised *Teague* until this late hour.

Petitioner misleads this Court by repeatedly claiming that the court below was "on notice"

of *Teague*, implying that under such circumstances the court was either under a duty to apply *Teague*, or at the least, should have applied *Teague*. Although Petitioner is forced to admit that the court was not "on notice" of *Teague* as a result of any of its own actions, Petitioner still misleads this Court by failing to clarify that the court sua sponte raised the issue of *Teague*. Rather than admitting that the lower Court sua sponte raised *Teague*, instead, Petitioner claims: "Despite *clear notice* as to the application of *Teague v. Lane*, 489 U.S. 288 the Ninth Circuit ignored *Teague* ...." (Pet. at 10, emphasis added); "[H]owever, this Court should find that, under circumstances such as exist in *Garceau*, where the court is expressly *on notice* of the application of *Teague*...." (Pet. at 13, emphasis added); and "[A]lthough the State did not itself raise *Teague*, there is no question that the Ninth Circuit was expressly *on notice* as to *Teague*'s application..." (Pet. at 13, emphasis added). Although Petitioner clearly wants to argue that the court was "on notice" of *Teague*, and therefore should have applied *Teague*, Petitioner refuses to admit that the court was "on notice" of *Teague* only because the court raised *Teague* of its own accord.

Petitioner's "on notice" language is entirely inapplicable to this case. This Court's decisions hold that "a federal court may, but need not, decline to apply *Teague* if the State does not *argue* it." *Caspari v. Bohlen*, 510 U.S. 389, emphasis added, applying *Schiro v. Farley*, 510 U.S. 228-229 ["federal courts must address the *Teague* question when it is properly *argued* by the government"]; *Horn v. Banks*, 122 S.Ct. 2147 (U.S. June 17, 2002). Nowhere in this Court's decisions in *Horn* and *Caspari* does this Court hold that the court must apply a *Teague* analysis when the court is "on notice" of *Teague* when the state never once raised or argued *Teague*. Clearly any time the court "may, but need not, decline to apply *Teague*" (*Caspari v. Bohlen*, 510 U.S. 389), the court would be "on notice" of *Teague*. This Court's decisions hold the exact opposite, therefore, of what Petitioner argues, and find that if the state fails to argue *Teague*, the court may decline to apply *Teague*. Petitioner's argument that the court was "on notice" of *Teague* is therefore misleading and irrelevant.

Petitioner further misleads this Court by arguing that the court of appeals failed to "consider" *Teague* (Pet. at i, Question 2A), failed to "address" *Teague* (Pet. at 13, 14), and failed to "apply" *Teague* (Pet. at 15). This specious argument implies that the court of appeals actually failed to consider *Teague*, when in fact that is clearly not the case. Contrary to Petitioner's

claims, the court did consider whether to apply a *Teague* analysis even though Petitioner had, both implicitly and explicitly, waived *Teague* in the district court, in the court of appeals directly in oral argument, and in fact did not raise *Teague* at all until its Petition for Rehearing (which was denied), and then in this Petition for Certiorari. Therefore, although there was no duty on the court to even consider *Teague* since it was never raised and was thereby waived by Petitioner, the court nonetheless did in fact sua sponte raise *Teague*. However, after deliberating on the issue, the court unanimously decided not to apply *Teague*, in part, at least, because even in the face of direct questioning, Petitioner still failed to raise *Teague*. *Garceau v. Woodford*, 275 F.3d 769, 781 (9th Cir. 2001) ["Because the state thus explicitly declined to invoke *Teague*, even when squarely presented with the opportunity to do so, I reluctantly conclude that it is inappropriate to analyze whether the *Teague* bar applies"]. Petitioner's attempt to confuse the issue by simultaneously arguing that the court failed to "consider" and failed to "apply" *Teague* is misleading. Even though under the circumstances of this case the court had no duty to apply *Teague*, the court of appeals did consider whether to apply *Teague* and in its discretion decided not to.

One of the reasons supporting the policy that the state must alert the court to *Teague* before the court is under a duty to consider *Teague*, is so that the court has ample opportunity to make a reasoned judgment on the issue. *Goeke v. Branch,* 514 U.S. 115, 117 (1995)(*per curiam*) [raising *Teague* in district court and appellate briefs and in extended oral argument on appeal suffices to allow the appellate court ample opportunity to make a reasoned judgement]; *see also Lyons v. Stovall*, 188 F.3d 327, 338 (6th Cir. 1999) [the court applied *Teague* stating that sufficient effort had been made to alert the court to *Teague* and provide ample opportunity for the court to make a reasoned judgment]. Here, Petitioner failed to provide, and continues to fail to provide, absolutely any explanation as to why *Teague* had not been raised, and no explanation whatsoever as to why it should apply on these facts. For the court to apply *Teague* under those circumstances would distort the balance between the parties. *Lyons v. Stovall,* 188 F.3d 350 (6th Cir. 1999) ["the appearance of justice is compromised when the court of appeals steps into the role of the state's attorney, raising a defense the state has waived in order to bar relief"]. Moreover, for this Court to sua sponte apply *Teague* could result in undue hardship to

Respondent. Because Petitioner never argued *Teague*, Respondent never briefed the issue. Under these circumstances, the court of appeals correctly exercised its discretion to determine that it would be inappropriate to apply *Teague*.

Petitioner seeks to paint a picture of a split between the circuits with regard to the application of *Teague*. This is a complete fallacy. All of the circuits agree there is no sua sponte duty on the court to raise *Teague*, and that the state can waive *Teague* by failing to raise it. *Lyons v. Stovall,* 188 F.3d 327; *Agard v. Portuondo,* 159 F.3d 98, 99-100 (2nd Cir. 1998) ["*Teague* is not jurisdictional in the sense that a court must invoke it *sua sponte* where applicable"]; *Wilmer v. Johnson,* 30 F.3d 451, 454-55 (3rd Cir. 1994)[respondent waived *Teague* by raising it for first time on appeal in supplemental brief requested by the Court]; *Sinistaj v. Burt,* 66 F.3d 804, 805 (6th Cir. 1995)[respondent waived *Teague* by raising it for the first time on motion to amend district court's judgment]; *Eaglin v. Welborn,* 57 F.3d 496, 499 (7th Cir. 1995); *Blankenship v. Johnson,* 118 F.3d 312, 316-317 (5th Cir. 1992). Petitioner cites absolutely no authority to the contrary. Although by use of selected quotations from *Jackson v. Johnson,* 217 F.3d 360 (5th Cir. 2000), Petitioner attempts to manufacture a split in the circuits, in fact, the decision of the Fifth Circuit is easily reconciled with the court of appeal's opinion in the case at hand.

Jackson stands for the proposition that "absent a compelling, competing interest of justice in a particular case, a federal court should apply *Teague* even though the state failed to argue it." *Jackson v. Johnson*, 217 F.3d 363. In *Jackson*, the state failed to raise *Teague* in the district court, but raised *Teague* on appeal. On appeal, the Fifth Circuit held that the state's implicit waiver of *Teague* in the district court did not prevent the court of appeal from applying *Teague* when the state raised it on appeal. Here, Petitioner failed to raise and argue *Teague* in the district court *and* on appeal, *even* where the reviewing court sua sponte raised the issue. Further, Petitioner is not arguing that the court was prevented from considering *Teague*, but rather that the court of appeals was not only obligated to consider it, but was *obliged* to apply it, notwithstanding the state's waiver. The facts of *Jackson* therefore make it entirely distinguishable from the present case.

Moreover, to the extent that *Jackson* departs from the earlier holdings of this Court, *Jackson* merely states that a court "*should*" apply *Teague*, "absent a compelling, competing

interest of justice." Such an advisory opinion on how the court *should* exercise its discretion is not directly in conflict with this Court's prior holdings and those of the other circuits that the court does not have a sua sponte *duty* to apply *Teague* if the state does not argue it and does not represent a circuit split. However, even to the extent that this decision represents a divergent opinion as to how the courts *should* exercise their discretion, this Court has just resolved any alleged conflict by reaffirming in *Horn* its prior holding in *Caspari* that *Teague* is not a jurisdictional issue, and that whether to apply *Teague* if the state fails to argue it is a matter purely within the court's *discretion*.

Petitioner's argument reveals that the real source of Petitioner's complaint is that the court of appeals exercised its discretion in Respondent's favor. Petitioner is essentially asking this Court to rule on an issue not fit for certiorari review: whether the court of appeals properly exercised its discretion. It can never be cert-worthy to argue that the court has sua sponte failed to exercise its discretion in a certain way. The rules of this Court state that "certiorari is rarely granted when the asserted error consists of... the misapplication of a properly stated rule of law." Sup. Ct. R. 10. There are no conflicts between the circuits with regard to the discretionary nature of the court's ability to waive *Teague* in the face of waiver by the state. Clearly this Court cannot and should not review the exercise of each court's discretion whether or not to apply *Teague* when waived by the state, when the scope of that discretion is not in issue.

Since the court had discretion to consider whether to apply *Teague*, as recently reaffirmed by this Court in its decision in *Horn*, this Court should not review the exercise of discretion to find that the court improperly found that Petitioner waived *Teague* and that *Teague* applied. It is wholly inappropriate for this Court on grant of certiorari to review the exercise of the court of appeals' discretion when the court of appeals acted within the scope of their discretion. It is a factual finding made by the court of appeals that the state never raised *Teague*. Petitioner should not be allowed to now argue that the court of appeals abused its discretion in finding that the state waived *Teague*. Although Petitioner implies that this issue raises important and recurring constitutional questions (Pet. at 15 ["[g]iven the important principles underlying *Teague*, federal courts should not be free to apply or ignore its restrictions at will"]), this Court has just decided in *Horn*, reaffirming a long line of decisions, that in circumstances such as these, where the state

waived *Teague*, the decision to apply *Teague* is a matter for the court's discretion.

For all these reasons, this Court should deny Petitioner's application for grant of writ of certiorari.

B. Since *Teague* Was Already Considered By The Court of Appeals, And Since The Court of Appeals Properly Exercised Its Discretion To Decide Not To Apply *Teague*, There Is No Reason For This Court To Consider Vacating The Lower Court's Decision

Petitioner argues that since *Teague* was properly raised in this petition for certiorari, and since *Teague* is a threshold issue, that the court of appeals decision should be reversed. Petitioner advances wholly inconsistent theories. In the first part of the question, Petitioner argues that the court of appeals failed to consider *Teague*, even though the court was "on notice"of *Teague*, an argument both irrelevant and completely belied by the facts. In the second part of the question, Petitioner now contends, "The prosecution has raised the application of *Teague v. Lane*, 489 U.S. 288 in this petition for certiorari. Despite the late assertion of this issue, the *Teague* issue is now properly before this Court." Pet. at 15. Petitioner's statement that this issue is "*now*" properly before this court contradicts Petitioner's earlier argument that this issue was *already* properly before the lower court and that court should therefore have applied *Teague*.

Although *Teague* is a threshold question when properly raised, Petitioner's argument that this issue is now properly raised in the petition for certiorari ignores the fundamental fact that Petitioner already waived this claim by failing to raise it in the district court, and again on appeal, even in the face of direct questioning as to its applicability. Petitioner has not properly raised *Teague* because Petitioner has simply waited too long to do so. Although Petitioner cites authority allegedly in support of their proposition that they can properly raise *Teague* on petition for certiorari, the authority cited by Petitioner merely explains that *Teague* was not addressed in those cases because it was not raised in the lower federal court or on petition for certiorari. These cases provided only the faintest support for an inference that had the state argued *Teague*

in their petitions for certiorari in those cases that *Teague* would have been applied. In fact, in both of those cases, this Court held that the state had *waived Teague*.

Moreover, Petitioner ignores the entire history of decisions of this Court holding that *Teague* cannot be raised for the first time on petition for certiorari. This court has repeatedly found waiver of *Teague* based on the failure of the state to raise *Teague* in the lower federal courts, and then again on appeal. *Schiro v. Farley, supra*, 510 U.S. 228 [the state can waive *Teague* by failing to make the argument in a timely fashion; court declined to apply *Teague* when it was raised for the first time only after certiorari was granted]; *Godinez v. Moran*, 509 U.S. 397 (1993); *Gilmore v. Taylor*, 508 U.S. 333, 339-340 (1993) [suggesting that the proper time to raise *Teague* is in the district court]; *Collins v. Youngblood*, 497 U.S. at 41; *Hopkins v. Reeves*, 524 U.S. 88, 94 [the Court declined to address *Teague* and instead decided the case on the merits because the state "raised the (*Teague*) argument for the first time in its petition for certiorari"]; *Goeke v. Branch*, 514 U.S. 115; *see also Agard v. Portuondo*, 159 F.3d 99 [court of appeals would not exercise discretion to hear *Teague* argument when the argument was raised for the first time on Petition for Rehearing]. By failing to raise *Teague* in the district court and on appeal in oral argument, Petitioner has waived their right to now raise *Teague*.

Petitioner also argues that comity is a reason that this Court should consider applying *Teague* in this case. However, this argument fails. General policies of finality and comity are the reasons the court has discretion to even consider applying *Teague* in the first place in the face of waiver by the state. Such general underlying policy reasons do not amount to specific reasons why the court in *this* case, should consider exercising its discretion in favor of applying *Teague*. Those considerations exist in all *Teague*-waiver cases and are no more weighty in this case. The reasons for *not* applying *Teague* in this particular case, however, are numerous.

First, consistent with the general approach in civil litigation with regard to waiver and claim forfeiture, and in criminal cases with regard to procedural requirements imposed on defendants, the state, like any other litigant, loses a defense if it fails to raise it. In addition to the policy reasons supporting a finding of waiver when the state fails to argue *Teague* (such as providing the court and opposing party ample opportunity to consider the issue and injustice that could result to the other party from reversing a decision when Petitioner had numerous

opportunities to raise *Teague* and failed to do so), there is the additional, more cynical possibility that Petitioner intentionally failed to raise *Teague* in the hopes of obtaining a favorable determination on the merits, and in the event of a finding that was adverse to its interests, raising *Teague* at that point. *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); *Granberry v Greer*, 481 U.S. 129, 132 (1987) ["unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding a ... defense in reserve for use on appeal if necessary"]; *Lyons v. Stovall*, 189 F.3d 346.

Absent compelling circumstances, the state should not receive any special treatment and should be held to the same procedural standards as other litigants. The appearance of justice is compromised when the court steps into the role of the state and applies a defense which the state has repeatedly waived. Moreover, it is particularly unfair for this Court to consider applying *Teague* when two courts below have found that a constitutional violation occurred, and, in fact, Petitioner makes no attempt to argue that the decision on the merits was wrong. Although *Teague* is driven in part by considerations of comity, comity also requires that "states not agree to expending substantial amounts of time on the merits of a case, only to argue belatedly that the merits have not been reached." *Agard v. Portuondo*, 159 F.3d 98, 100; *Boardman v. Estelle*, 957 F.2d 1534-37 (9th Cir. 1992). When the court can allow a procedural default to result in a person's execution (*see* e.g. *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983)), it can allow a default to stand in this case where Petitioner knowingly, when repeatedly given the option to do so, failed to raise *Teague*. "This Court has fashioned harsh rules of waiver and claim forfeiture to defeat substantial constitutional claims." *Caspari v. Bohlen*, 510 U.S. 397. If the court is to apply such a harsh approach to waiver in habeas corpus litigation, it should hold Petitioner to the same standard in this case. *Ibid.* "Finality, and its companion, waiver, must run along a two-way street." *Williams v. Dixon*, 961 F.2d 457 at 459 (4th Cir. 1992). Given the circumstances of this case, and in particular, Petitioner's failure to raise *Teague* in the district court and on appeal, the court of appeals properly exercised its discretion in deciding not to apply *Teague*.

Even if there was a *Teague* issue in this case (and if there was, Petitioner repeatedly waived it), this is the not the case in which to now apply it. First, Petitioner never raised *Teague* until their Petition for Rehearing and for Certiorari, and to this day, Petitioner still has not given

any explanation for their failure to raise *Teague*. Second, Petitioner does not even claim to dispute the California Supreme Court's finding of error or the merits of the court of appeals' finding. Since Petitioner apparently accepts those findings as correct, Petitioner cannot argue that there is a comity problem. Third, the instruction given to the jury at trial conflicts so directly with the approved jury instruction, that it is highly unlikely that this issue will ever reappear. For all of these reasons, this case is wholly inappropriate for certiorari review. This Court should deny Petitioner's application for grant of writ of certiorari review.

Respectfully submitted,

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(11)

SUPREME COURT U.S.
FILED
JUL 23 2002
OFFICE OF THE CLERK

No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

JEANNE WOODFORD, Petitioner,

v.

ROBERT FREDERICK GARCEAU, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

DEATH PENALTY CASE

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81 pp

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FILED
KERN COUNTY
MAY 2 1995
TERRY McNALLY, CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

THE PEOPLE OF THE STATE OF CALIFORNIA) No. SC029601A
VS.) NOTICE OF HEARING
ROBERT FREDERICK GARCEAU) DATE: May 16, 1995
) TIME: 8:30 A.M.
) DEPT: One

Whereas this Court having been notified that the United States Supreme Court denied the defendant's Writ of Certiorari on October 3, 1994, the automatic appeal from the death sentence being denied by the California Supreme Court on November 18, 1993, and a motion seeking to stay the issuance of the remittitur and requesting rehearing being denied on January 26, 1994, hearing is set pursuant to Rule 490 of the California Rules of Court, to wit:

The Setting of Execution Date will be heard on May 16, 1995, at 8:30 A.M., in Department One of the Superior Court, County of Kern.

DATED: May 2, 1995

TERRY McNALLY
Clerk of the Superior Court

by C. L. KING, Deputy

FILED
KERN COUNTY
MAY 2 1995
TERRY McNALLY, CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

THE PEOPLE OF THE STATE OF CALIFORNIA) No. SC029601A
VS.) CERTIFICATE OF PROOF OF SERVICE BY MAIL
ROBERT FREDERICK GARCEAU)

The undersigned, of said Kern County, says: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern; that I am a citizen of the United States, over 18 years of ages, a resident of Kern County, and not a party to the within action, that I served the above Notice of Hearing on counsel for the respective parties in the within action by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid in the United States Mail at Bakersfield, California, addressed as shown on the list attached and made a part hereof.

Executed on: May 2, 1995, at Bakersfield, California.

C. L. KING, Deputy Clerk

PEOPLE VS. GARCEAU, SC029601A

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Robert Frederick Garceau
D-39413
San Quentin Prison
Tamal, CA 94974

LSC

JUDGE-

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FILED
MAY 12 1995
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU,

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

No CV-F-95 5363OWW -P

~~[PROPOSED]~~ ORDER STAYING EXECUTION AND ALL PROCEEDINGS

Upon request of petitioner ROBERT FREDERICK GARCEAU, through his state appellate counsel, and pursuant to Local Rules 191 (d) (1) and 191 (h) (2),

IT IS HEREBY ORDERED that all proceedings, including the execution of petitioner's sentence of death be stayed forty-five (45) days to permit the appointment of counsel for petitioner. The Warden of San Quentin Prison is ordered to stay all proceedings related thereto, and to stay the scheduling of any execution date for forty-five (45) days to, and including, June 26, 1995, unless such stay is extended by the Court.

IT IS FURTHER ORDERED, that this matter be referred to the Selection Board for the United States District Court for the Eastern District of California for its recommendation regarding the reappointment of state appellate counsel to represent petitioner in federal habeas corpus proceedings.

The Clerk of the Court shall give immediate telephonic notice to respondent, Arthur Calderon,

DEATH PENALTY

Warden of the San Quentin Prison, that petitioner s execution is stayed by the Order of this Court. The Clerk of the Court shall also serve a certified copy of this order on petitioner, respondent, Arthur Calderon, Warden of San Quentin State Prison, Arthur Ruthenbeck, Federal Defender and Chair of the Selection Board for the Eastern District, Michael G. Millman, Executive Director of the California Appellate Project and member of the Selection Board for the Eastern District; the Clerk of the Kern County Superior Court, Daniel Lungren, Office of the Attorney General of the State of California, and Edward Jagels, District Attorney of Kern County

DATED May 12, 1995

UNITED STATES DISTRICT JUDGE

PRESENTED BY

Weinberg & Wilder

By
DORON WEINBERG

Law Office of Denise Kendall

By
DENISE KENDALL

Attorneys for Petitioner
ROBERT FREDERICK GARCEAU
in California Supreme Court Proceedings

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT FREDERICK GARCEAU

vs. CV-F-95-5363-OWW-P

ARTHUR CALDERON

_____/

I, the undersigned, hereby certify that I am an employee of the Office of the Clerk, U.S. District Court, Eastern District of California. That on 5/12/95, the original having been filed, I served a copy of the attached order staying execution, by placing a copy in a postage-paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Fresno, California, or by placing said copy in an inter-office delivery receptacle located in the Clerk's Office.

SERVED BY MAIL: SERVED BY INTER-OFFICE DELIVERY:

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By
T. Bertalotto, Deputy

prfsvc

1CV

5/12/95

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On behalf of ROBERT FREDERICK GARCEAU

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU,

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

_____/

Case No CV F-95-5363-OWW-P

EX PARTE APPLICATION FOR STAY OF ALL PROCEEDINGS TO PERMIT APPOINTMENT OF COUNSEL, NOTICE OF INTENTION TO FILE PETITION FOR WRIT OF HABEAS CORPUS, CONDITIONAL APPLICATION FOR APPOINTMENT OF COUNSEL, AND DECLARATIONS OF DORON WEINBERG AND DENISE KENDALL

Petitioner ROBERT FREDERICK GARCEAU, a prisoner of the State of California, hereby gives notice pursuant to Rules 191 (d) (1) and 191 (h) (2) of the Local Rules of practice of the United States District Court for the Eastern District of California (Hereinafter "Local Rules") that he intends to file a petition for writ of habeas corpus to seek relief from the judgement of death imposed against him by the Kern County Superior Court, State of California, finding him guilty of first degree murder and imposing a sentence of death upon him, and hereby requests appointment of counsel. The subject judgment has been affirmed in all respects by the

California Supreme Court, and the United States Supreme Court has denied certiorari review. State appellate counsel are appearing specially on Mr. Garceau's behalf for the purpose of filing the subject notice, applying for a stay of all proceedings to permit appointment of counsel, conditionally applying to be appointed as counsel subject to a status conference regarding such appointment.

The District Attorney for Kern County, State of California, has moved the Superior Court of Kern County for an execution setting conference to be held on May 16, 1995. The District Attorney additionally moved the court for an execution date of July 14, 1995. Petitioner hereby applies for an immediate stay of all proceedings for forty-five (45) days through and including June 26, 1995, to permit the appointment of counsel to represent him in federal habeas corpus proceedings.

Petitioner also applies to this Court pursuant to Local Rules 191 (d) (1) and 191 (h) (2) for an order referring this matter to the Selection Board for the United States District Court for the Eastern District of California for its recommendation regarding the reappointment of state appellate counsel to represent petitioner in federal habeas corpus proceedings. The rules of this Court provide that when state appellate counsel is willing to continue to represent a capital habeas corpus petitioner in federal proceedings, he may apply to confirm his appointment before undertaking preparation of a petition for writ of habeas corpus. Local Rule 191 (d) (1). Mr. Weinberg and Ms. Kendall have represented petitioner before the California Supreme Court on automatic appeal and in state habeas corpus. Counsel are familiar with the issues in the case and desire to continue representing petitioner in federal habeas corpus proceedings. To this end, state appellate counsel respectfully request a status conference for the purpose of determining the ability of counsel to continue to represent petitioner, the propriety of counsels' doing so and the Court's expectations concerning such continuing representation. Counsel would be available to meet with the Court on May 23rd or 30th, 1995 or at such other time as the Court might suggest.

The status of petitioner's case and history of representation are

1. On June 15, 1987, petitioner was convicted by a jury in criminal case number 29601 of two counts of first degree murder, enhanced with a finding of personal use of a deadly or dangerous weapon in the Superior Court of Kern County, California. (California Penal Code sections 187 and 12022.) Petitioner was also convicted of the special circumstance of conviction of more than one offense of murder, rendering petitioner death eligible. (California Penal Code section 190.2 (a) (3).) On June 25, 1987 the jury returned a verdict of death.

2. The California Supreme Court subsequently appointed Doron Weinberg and Lynne Coffin to represent petitioner in connection with his automatic appeal of the convictions and death judgment. Thereafter Lynne Coffin withdrew from the case and Denise Kendall substituted in as co-counsel for petitioner. Counsel timely filed petitioner's automatic appeal to the California Supreme Court in criminal case number S004776. On November 18, 1993, the California Supreme Court affirmed the judgment and sentence of death. People v. Garceau, 6 Cal.4th 140 (1993).

3. Petitioner timely filed his petition for writ of habeas corpus with the California Supreme Court on or about August 9, 1991. On September 1, 1993 the petitioner for writ of habeas corpus was denied on the merits.

4. Petitioner subsequently filed a timely petitioner for writ of certiorari with the United States Supreme Court, which was denied on October 3, 1994.

5. Petitioner, who is indigent, has been confined at the California State Prison at San Quentin, San Quentin, California since his original sentencing on July 30, 1987.

6. The District Attorney of Kern County has requested the court set an execution date of July 14, 1995. A hearing on the request is scheduled for May 16, 1995. No other state proceedings are currently pending.

7. State appellate counsel believe there are multiple meritorious claims of violations of petitioner's federal constitutional rights which will be presented to this Court in a petition for writ of habeas corpus. The United States Supreme Court has mandated that a habeas corpus

petitioner "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas corpus petition." McCleskey v. Zant, ___ U.S. ____, 111 S.Ct. 1454, 1472 (1991) (emphasis added). Counsel will request a reasonable period within which to continue the investigation in anticipation of presenting all meritorious claims in a petition filed with the Court.

In light of the above, petitioner requests the following:

(a) that the Court issue an immediate stay of all proceedings for forty-five (45) days through and including June 26, 1995 to permit the appointment of counsel in federal habeas proceedings;

(b) that the Court convene a conference with state appellate counsel on May 23rd or 30th, 1995 or at such other time as is convenient to the Court, to discuss the terms of counsels' continued representation of petitioner; and

(c) that the Court refer this matter to the Selection Board for the United States District Court for the Eastern District of California for its recommendation regarding the reappointment of state appellate counsel to represent petitioner in federal habeas corpus proceedings.

DATED: May 11, 1995

Respectfully submitted,

DORON WEINBERG

DENISE KENDALL

DECLARATION OF DORON WEINBERG

I, DORON WEINBERG, declare:

1. I am an attorney at law admitted to practice before this court and was appointed by the California Supreme Court to represent petitioner in the automatic appeal of his convictions and death judgment and in the state habeas corpus proceedings stemming from the same convictions and judgment of death. As a result of my representation of petitioner, I have personal knowledge of the facts set forth herein.

2. At the time of my appointment to represent petitioner in connection with his automatic appeal, petitioner was indigent. Petitioner remains indigent today.

3. I have prepared with co-counsel the documents entitled Ex Parte Application for Stay of Execution to Permit Appointment of Counsel; Notice of Intention to File Petition for Writ of Habeas Corpus; Conditional Application for Appointment as Counsel; Request for Status Conference; and Declaration of Denise Kendall to which this declaration is appended. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 11, 1995 at San Francisco, California.

DORON WEINBERG

DECLARATION OF DENISE KENDALL

I, DENISE KENDALL, declare:

1. I am an attorney at law admitted to practice before this court and substituted in as co-counsel to represent petitioner in the automatic appeal of his convictions and death judgment and in the state habeas corpus proceedings stemming from the same convictions and judgment of death. As a result of my representation of petitioner, I have personal knowledge of the facts set forth herein.

2. At the time of my substitution to represent petitioner in connection with his automatic appeal, petitioner was indigent. Petitioner remains indigent today.

3. I have prepared with co-counsel the documents entitled Ex Parte Application for Stay of Execution to Permit Appointment of Counsel; Notice of Intention to File Petition for Writ of Habeas Corpus; Conditional Application for Appointment as Counsel; Request for Status Conference; and Declaration of Doron Weinberg to which this declaration is appended. The information contained therein is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 11, 1995 at San Francisco, California.

DENISE KENDALL

PROOF OF SERVICE BY MAIL

I am a citizen of the United States; I work in the county of Marin, where this mailing occurs; I am over the age of eighteen and not a party to the within action. My business address is 862 Sir Francis Drake, No. 301, San Anselmo, CA 94960. I served the within:

Ex Parte Application for Stay of Execution to Permit Appointment of Counsel; Notice of Intention to File Petition for Writ of Habeas Corpus; Conditional Application for Appointment as Counsel; Request for Status Conference; and Declaration of Doron Weinberg; Declaration of Denise Kendall

on the following person(s) on the date set below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, by United States mail at San Francisco, California, as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 11, 1995, at San Anselmo, California.

DENISE KENDALL

SERVICE LIST
(Robert Garceau v. Arthur Calderon)

Office of the Attorney General
P.O. Box 9442550
Sacramento, CA 94244-2550

Edward Jagels, Esq.
District Attorney
Kern County
1215 Truxton Ave
Bakersfield, CA 93301

Gale S. Enstad, County Clerk
Kern County Superior Court
1415 Truxton Ave.
Bakersfield, CA 93301

Michael G. Millman, Esq.
California Appellate Project
One Ecker Place, Ste. 400
San Francisco, CA 94105

Arthur W. Ruthenbeck, Esq.
Office of the Federal Defender
801 K Street, 10th Floor
Sacramento, CA 95814

Mr. Robert F. Garceau
D-39413
San Quentin Prison
Tamal, CA 94974

Arthur Calderon, Warden
San Quentin State Prison
San Quentin, CA 94964

FILED
JUN 26 1995
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner, vs. ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	No. CV-F-95-5363-OWW-P DEATH PENALTY CASE ORDER APPOINTING COUNSEL AND TEMPORARY STAY OF EXECUTION

Petitioner, a state prisoner facing capital punishment, filed a petition for a writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254. On May 12, 1995, this court stayed Petitioner's execution for forty-five (45) days and referred the matter to the Selection Board for its recommendation of one or more counsel to be appointed to represent Petitioner.

The Selection Board has recommended the appointment of Denise Kendall, Esq. and the California Appellate Project as co-counsel to represent Petitioner. Given the complex, demanding, and protracted nature of death penalty proceedings, this court has the authority to appoint two counsel to represent

Petitioner. 21 U.S.C. § 848(q)(4).

GOOD CAUSE APPEARING:

IT IS ORDERED that Denise Kendall, Law Office of Denise Kendall, 862 Sir Francis Drake Boulevard, Suite 301, San Anselmo, CA 94960, (415) 258-0296, and the California Appellare Project, One Ecker Place, Fourth Floor, San Francisco, CA 94105, (415) 495-0500, are appointed as co-counsel to represent Petitioner for all purposes in these proceedings.

IT IS FURTHER ORDERED that Petitioner is granted a temporary stay of execution for one hundred twenty (120) days from the date of this order to prepare and file his amended petition, such time to be extended upon a showing of good cause. Local Rule 191(h)(3).

IT IS FURTHER ORDERED that Respondent shall lodge the state record in accordance with the provisions of Local Rule 191(i) within thirty days of service of this order.

IT IS FURTHER ORDERED that each document be specially marked as follows to facilitate processing:

1) Directly below the case number in the caption of each document provide the following label: "DEATH PENALTY CASE" in capital letters and underscored;

2) At the bottom of the first page of each document insert "DEATH PENALTY" in capital letters with a stamp or a felt-tipped marker.

DATED: June 16 1995

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU,
Petitioner,

vs. CV-F-95 5363 OWW P

ARTHUR CALDERON, as Warden of San Quentin State Prison,
Respondent.

_____/

I, the undersigned, hereby certify that I am an employee of the Office of the Clerk, U.S. District Court, Eastern District of California. That on June 26, 1995, the original having been filed, I served a copy of the attached order granting temporary stay of execution and appointment of counsel, by placing a copy in a postage-paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Fresno, California, or by placing said copy in an inter-office delivery receptacle located in the Clerk's Office.

SERVED BY MAIL:

Robert F. Garceau
P.O. Box D-39413
Tamal, CA 94974

Denise Kendall
862 Sir Francis Drake, No. 301
San Anselmo, CA 94960

Michael G. Millman, Executive Director
Lynne S. Coffin, Staff Attorney
California Appellate Project
One Ecker Place, Ste 400
San Francisco, CA 94105

Arthur Calderon, Warden
California State Prison, San Quentin
San Quentin, CA 94964

Dan Lungren, Attorney General
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

SERVED BY INTER-OFFICE DELIVERY:

Arthur Ruthenbeck, Federal Defender
801 K Street
Sacramento, CA 95814

Jerri Curtis, Capital Case Coordinator
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Kern County Clerk
Attn: Criminal Division
1415 Truxtun Avenue
Bakersfield, Ca 93301

T. Bertalotto, Deputy Clerk

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
JOHN A. GORDNIER (State Bar #45250)
Senior Assistant Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5169

Attorneys for Respondent

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner, v. ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	No. CV-F-5363-OWW-P **DEATH PENALTY CASE** NOTICE OF MOTION TO VACATE THE STAY OF EXECUTION Date: Sept. 5, 1995 Time: 10:00 a.m. Dept: 2

Respondent hereby gives notice that on the fifth day of September, 1995, at ten o'clock a.m. or as soon thereafter as the Court can hear the matter, he will move to vacate the stay of execution now in effect and, further, will seek an order directing that a petition be filed forthwith.

Said motion will be made on the basis of the record lodged with the Court on July 18, 1995, the points and authorities which accompany the motion attached to this notice and any other relevant authorities subsequently filed and provided to counsel for

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/ / / /

/ / / /

petitioner.

DATED: August 1, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General

JOHN A. GORDNIER
Senior Assistant Attorney General

JAG:es
SA95VW0003

DECLARATION OF SERVICE BY MAIL

Re: Garceau v. Calderon No. CV-F-95-5363-OWW-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

NOTICE OF MOTION TO VACATE THE STAY OF EXECUTION

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Denise Kendall
Attorney at Law
862 Sir Francis Drake, No. 301
San Anselmo, CA 94960

Mr. Robert F. Garceau
D-39413
San Quentin Prison
Tamal, CA 94974

Honorable Gale S. Enstad
Clerk, Kern County
1415 Truxtun Avenue
Bakersfield, CA 93301

Arthur Calderon, Warden
San Quentin Prison
San Quentin, CA 94964

Jerri Curtis
Capitol Case Coordinator
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Michael G. Millman, Esq.
Staff Attorney
Calif. Appellate Project
One Ecker Place, Ste 400
San Francisco, CA 94105

Arthur Ruthenback, Esq.
Federal Defender
801 K Street
Sacramento, CA 95814

Edward Jagels, Esq.
Kern Co. District Attorney
1415 Truxton Ave.
Bakersfield, CA 93301

Each said envelope was then, on August 1, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 1995, at Sacramento, California.

DECLARANT

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
JOHN A. GORDNIER (State Bar #45250)
Senior Assistant Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5169

Attorneys for Respondent

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner,	)	No. CV-F-5363-OWW-P DEATH PENALTY CASE
ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	)	MOTION TO VACATE THE STAY OF EXECUTION Date: Sept. 5, 1995 Time: 10:00 a.m. Dept: 2

PROCEDURAL STATEMENT

On May 12, 1995, this court entered an order staying the execution of petitioner for forty-five days to permit appointment of counsel for petitioner. This order was entered at the request of the counsel who represented petitioner in both his appeal of conviction and his petition for habeas corpus before the California Supreme Court.

In the petition counsel in the state proceedings specifically asked to continue to represent petitioner in the federal habeas corpus proceedings.

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On June 16, 1995[1], this court entered an order which appointed counsel who represented petitioner in the state proceedings as counsel in the federal habeas corpus proceedings. The order also granted a stay of one hundred twenty days from that date for the purpose of filing the amended petition.[2]

As of the date of the filing of this motion no petition has been filed and served on respondent. The execution date previously set has been vacated and no new date has been scheduled because of this court's stay issued as part of the June 16, 1995 order. The purported authority for this stay is Rule 191(h)(3) of the local (Eastern District) rules.

STATEMENT OF THE ISSUE

WHEN COUNSEL WHO IS NOT NEW TO THE CASE IS APPOINTED RULE 191(h)(3) DOES NOT PERMIT A STAY OF EXECUTION TO BE ISSUED.

Rule 191(h)(3) provides, in pertinent part:

> "Where *counsel new to the case* is appointed, upon counsel's application for a temporary stay of execution *accompanied by a specification of nonfrivilous issues to be raised in the petition*, the Court shall issue a temporary stay of execution . . ." (Emphasis added.)

The language of the rule goes on to provide for a one hundred and twenty day stay.

There are two reasons why Rule 191(h)(3) cannot be applied in this case.

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1. While the date on the order is June 16, 1995, the order was not filed until June 26, 1995.

2. The use of the word "amended" would appear to be in error. The only documents provided to respondent are an Order Staying Execution, an Ex Parte Application For Stay . . . Notice Of Intention To File Petition For Writ Of Habeas Corpus . . . and Order Appointing Counsel. No petition has been filed or if it has been filed it has not been timely served on respondent.

First, assuming that "counsel new to the case" had been appointed, there has been no "specification of nonfrivilous issues". On pages three and four of the Ex Parte Application upon which this court's May 12th order is based, there is a conclusory statement that "State appellate counsel believe there are multiple meritorious claims of petitioner's federal constitutional rights which will be presented . . . in a petition . . .". No other representations were made. Thus, the rule simply was not satisfied because no attempt was made to specify the issues as required.

Second, and more important, this case does not involve "counsel new to the case". This is undisputed. At page two of the Ex Parte Application upon which this court's May 12th order is based, petitioner's counsel stated:

> "The rules of this Court provide that when state appellate counsel is willing to continue to represent a capital habeas corpus petitioner in federal proceedings, he may apply to confirm his appointment before undertaking preparation of a petition for writ of habeas corpus. *Mr. Weinberg and Ms. Kendall have represented petitioner before the California Supreme Court on automatic appeal and in state habeas corpus.* Local Rule 191(d)(1)." (Emphasis added.)

Indeed, it appears to be undisputed that counsel for petitioner recognized that Rule 191(h)(3) did not apply. Counsel for respondent agrees that Rule 191(h)(3) cannot apply and, therefore, asserts that the stay issued under the authority of that rule must be vacated forthwith.[3/]

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3. Counsel for petitioner may argue that because C.A.P. was named as second counsel there is a "counsel new to the case" involved. Respondent would argue that before any such assertion were permitted by this Court it would be necessary for C.A.P. to represent that it has not previously had any exposure to or involvement in the direct appeal or state habeas matters.
Even if such an affidavit were filed it would not matter

Rule 191(d)(1) actually provides:

> "In light of this presumption (favoring continuing representation by state appellate counsel), it is expected that appointed counsel who is willing to continue representation and who has been certified by the selection board as qualified to do so, *would ordinarily file a motion for appointment of counsel* on behalf of his or her client *together with the client's federal habeas corpus petition. If however, counsel for any reason wishes to confirm appointment before preparing the petition, counsel may move for appointment as described above, before filing the petition.*"

Thus, the local rule permits counsel one of two avenues. The first is to file the application for appointment and petition at the same time (the ordinary method) and the second is to file the petition at the time he or she knows the appointment is confirmed; in this case on or about June 26th or within a reasonable time thereafter.[4/]

Petitioner's broad assertion, without citation to authority, that the local rules permit waiting for confirmation of appointment "before undertaking preparation of a petition . . ." is simply wrong. As we have seen the rule permits waiting until confirmation "before filing the petition."[5/]

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because it is clear from reading rule 191(d)(1) that second counsel's familiarity or lack thereof does not govern the time for filing the petition (see the argument in the main body of this motion, *infra*).

4. Given the familiarity of counsel with the case, a reasonable time would be the same amount of time given a respondent familiar with the case. By rule this would be thirty days (see Rule 191(i)(3); see also Rule 191(i)(4)).

5. While the language of the last sentence of Rule 191(d)(1) does, at one point use the phrase "before preparing the petition" the context is clearly that the only time added is that which is necessary to confirm appointment and not an undefined period beyond confirmation.

As was stated in *Steffen* v. *Tate* 39 F.2d 622 (6th Cir. 1994):

> "Consequently, the issue comes down to whether a petitioner who is clearly able and ready, though definitely unwilling, to file a writ of habeas corpus comes under the *McFarland* rule, which would permit a federal court to stay an execution without a pending habeas petition. We hold that *McFarland* does not extend that far. It would be a mockery of the limited role of federal courts in state criminal proceedings to allow federal courts simply to shut down the state capital-punishment process on the pretense that a habeas proceedings is 'pending'." (At page 627.)

While *Steffen* involved the issue of unexhausted state issues, the logic cited *supra*, has been applied in *In re Parker* 49 F.3d 204 (6th Cir. 1994), a case remarkably similar to this.

Parker was a case in which the Circuit Court of Appeals granted a writ of mandate directing a district court to vacate a stay of execution granted in a case in which counsel familiar with and previously of record in that case was counsel in the federal habeas corpus proceeding. In words which, respondent submits, speak to the heart of the problem in this case, the *Parker* court held:

> "Neither the statute nor *McFarland* stand for the proposition that an already well-represented prisoner may invoke the 'stay' jurisdiction of a federal court by seeking pre-petition appointment of counsel who already represents him. Stanford's position would allow a prisoner with counsel who has represented him for years, as is the case here, to stop all state proceedings against him indefinitely at the sufferance of a federal judge with no habeas petition pending before him. This stay would not exist, as it normally would, for as long as it takes to decide the merits of the petition. This pre-petition stay survives until either Stanford decides to file his actual petition, or until the district court or this court decides to dissolve the stay, thereby forcing the filing of the habeas petition.
>
> "*McFarland* did not countenance such an outcome. In fact such ad hoc decision making in capital cases is

> exactly what the Supreme Court has been trying to avoid. *See McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). As we stated in *Steffen v. Tate*, 39 F.3d 622, 625 (6th Cir. 1994), '[t]here is no indication in the opinion that the Court's reading of the statute applies to the case of a well-counseled prisoner whose counsel, for technically admirable, though dilatory, reasons, wishes to obtain both the security of a stay of execution from a federal court while simultaneously reserving, rather than exercising and thus exhausting, his right to federal court review by petitioning for a writ of habeas corpus.'" (At page 211.)

CONCLUSION

Here some thirty plus days have passed since counsel of record in both the state criminal appeal and state habeas corpus proceeding was confirmed as counsel in the federal habeas proceeding, yet no petition is on file. Respondent now asks this Court to enforce its own rules, vacate the stay erroneously ordered on May 16th and direct that counsel file the petition forthwith.

DATED: August 1, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General

JOHN A. GORDNIER
Senior Assistant Attorney General

JAG:as
SAPSXW0003

DECLARATION OF SERVICE BY MAIL

Re: Garceau v. Calderon No. CV-F-95-5363-OWW-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

MOTION TO VACATE THE STAY OF EXECUTION

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Denise Kendall
Attorney at Law
862 Sir Francis Drake, No. 301
San Anselmo, CA 94960

Jerri Curtis
Capitol Case Coordinator
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Mr. Robert F. Garceau
D-39413
San Quentin Prison
Tamal, CA 94974

Michael G. Millman, Esq.
Staff Attorney
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One Ecker Place, Ste 400
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Honorable Gale S. Enstad
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Arthur Ruthenback, Esq.
Federal Defender
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Sacramento, CA 95814

Arthur Calderon, Warden
San Quentin Prison
San Quentin, CA 94964

Edward Jagels, Esq.
Kern Co. District Attorney
1415 Truxton Ave.
Bakersfield, CA 93301

Each said envelope was then, on August 1, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 1995, at Sacramento, California.

Kristi Hamilton
DECLARANT

ORIGINAL FILED
AUG 15 1995
CLERK, U.S. DIST. COURT
Eastern District of California

LYNNE S. COFFIN, State Bar No. 121389
CALIFORNIA APPELLATE PROJECT
One Ecker Place, Suite 400
San Francisco, California 94105
Telephone: 415/495-0500

DENISE KENDALL, State Bar No. 120802
LAW OFFICE OF DENISE KENDALL
862 Sir Francis Drake, No. 301
San Anselmo, CA 94960
Telephone: (415) 258-0296

Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

DEATH PENALTY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV-F-5363-OWW-P SPECIFICATION OF NON-FRIVOLOUS ISSUES

TO THE HONORABLE OLIVER W. WANGER, JUDGE OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA:

Petitioner ROBERT FREDERICK GARCEAU, through his attorney, Lynne S. Coffin, Supervising Attorney, California Appellate Project, hereby submits, pursuant to Rule 191(h)(3) of the Local Rules of the United States District Court for the Eastern District

/ / / /

/ / / /

of California, a Specification of Non-frivolous Issues.

DATED: June 16, 1995 Respectfully submitted,

DENISE KENDALL
LAW OFFICES OF DENISE KENDALL

LYNNE S. COFFIN
CALIFORNIA APPELLATE PROJECT

By Lynne S. Coffin
LYNNE S. COFFIN
Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

A. **Procedural History**

1. On May 12, 1995 this Court entered an order staying the execution of Petitioner for forty-five days to permit appointment of counsel. Subsequently, the selection board recommended the appointment of Lynne S. Coffin of the California Appellate Project and Denise Kendall as co-counsel for petitioner. Thereafter on June 16, 1995, this Court ordered a temporary stay of execution for one hundred and twenty (120) days for petitioner to prepare and file his petition of writ of habeas corpus.

2. Based on a very preliminary review of the case materials, counsel believe there are a number of substantial federal constitutional issues that implicate the validity of both the judgment and the sentence imposed in this case. Counsel have set forth those issues below in the specification of non-frivolous issues pursuant to Local Rule 191(h)(3).

B. **Specification of Non-frivolous Issues**

Petitioner Robert Frederick Garceau through his attorney, hereby submits the following statement of non-frivolous issues pursuant to Local Rule 191(h)(3). Based on a preliminary review of case materials, counsel believes the following federal constitutional issues exist in this case and are among the issues that may be raised on petitioner's behalf in a petition for habeas corpus:

1. The guilt, special circumstances, and judgment of death were unconstitutionally found and imposed in violation of petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the prosecutor improperly employed peremptory challenges to

purposefully exclude Hispanic women from the jury.

a. The record shows that the prosecutor improperly exercised peremptory challenges to remove all of the Hispanic women from the jury. Initially, the prosecutor challenged the following perspective jurors: Sharon Montoya, Dolores Nejera, Jane Chavez, Lucy Martinez, and Hope Vasquez. Immediately following the excusal of Vasquez, defense counsel moved for a mistrial on the ground that the prosecutor improperly had exercised peremptory challenges on the basis of groups bias, resulting in the purposeful exclusion of Hispanic women. Defense counsel made a second motion for mistrial immediately following the prosecutions' exercise of a peremptory challenge against Rita Asuncion, the sixth and sole remaining Hispanic woman on the panel. The trial court denied the defense motion.

b. The prosecutor's use of peremptory challenges to strike each and every Hispanic woman from the jury exhibited a group bias in violation of petitioner's rights to a fair trial and equal protection of law. Swain v. Alabama (1965) 380 U.S. 202; Batson v. Kentucky (1986) 476 U.S. 79

2. Improper arguments made by the prosecutor during the penalty phase of petitioner's trial violated petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution. The record shows that the prosecutor improperly invoked and injected such matters as future dangerousness and petitioner's military service into the penalty determination, thus violating petitioner's rights of due process and fundamental fairness, and the right to a reliable and individualized sentence. Lockett v. Ohio, 438 U.S. 586, 57

L.Ed.2d 973, 98 S.Ct. 2954 (1978); Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).

DATED: 9/14, 1995

Respectfully submitted,

DENISE KENDALL

LYNNE S. COFFIN

CALIFORNIA APPELLATE PROJECT

By _____
LYNNE S. COFFIN
Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

LYNNE S COFFIN, Staff Attorney
CALIFORNIA APPELLATE PROJECT
One Ecker Place, Suite 400
San Francisco, California 94105
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DENISE KENDALL
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862 Sir Francis Drake, No 301
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ORIGINAL FILED
AUG 15 1995
CLERK, U.S. DIST. COURT
Eastern District of California

DEATH PENALTY

On behalf of ROBERT FREDERICK GARCEAU

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU,

Petitioner,

Case No CV-F-5363-OWW-P

PETITONER'S OPPOSITION TO MOTION TO VACATE THE STAY OF EXECUTION

ARTHUR CALDERON, as Warden of California State Prison at San Quentin,

Respondent.

_____/

Petitioner ROBERT FREDERICK GARCEAU, through counsel, hereby opposes respondent's Motion to Vacate the Stay of Execution and requests this Court decline to enter an order requiring Petitioner to file his petition for writ of habeas corpus forthwith as requested by Respondent.

Petitioner also hereby gives notice that the date to hear Respondent's motion has been changed by stipulation between the parties from September 5, 1995 to [September 25, 1995 or October 2, 1995], 1995 at 10 00 a.m. or as soon thereafter as the Court can hear the matter.

/ / / /

DEATH PENALTY CASE

PROCEDURAL STATEMENT

On May 12, 1995 this Court entered an order staying the execution of Petitioner for forty-five days to permit appointment of counsel for petitioner. This order was requested on behalf of Petitioner by Doron Weinberg and Denise Kendall. The Court referred the matter to the Selection Board for its recommendation of one or more counsel to be appointed to represent Petitioner. The Selection Board recommended the appointment of the California Appellate Project and Denise Kendall as co-counsel to represent Petitioner. Thereafter, on June 16, 1995 this Court ordered a temporary stay of execution for one hundred twenty (120) days for Petitioner to prepare and file his petition for writ of habeas corpus.

Respondent now claims that petitioner should be made to file his petition forthwith because appointed counsel is not "counsel new to the case" within the meaning of Rule 191(h)(3) of the Local Rules of practice of the United States District Court for the Eastern District of California (hereinafter Rule).[1]

ARGUMENT

The heart of Respondent's contention appears to be set forth in footnote 3 of its motion, which makes clear that in Respondent's view in order to qualify as "new to the case," counsel must not have "previously had any exposure to or involvement in the direct appeal or state habeas matters." (Respondent's Motion to Vacate the Stay of Execution (hereinafter Motion), page 3, fn. 3.) Clearly this is not what the rule contemplates. It would be ludicrous to suggest an attorney who has at one time briefly consulted on a capital case in any capacity is thereby precluded from receiving a 120-day stay to read the lengthy record, investigate the case, and prepare the petition. To the contrary, what the rule actually contemplates is a situation in which

_____

[1] Rule 191(h)(3) provides, in pertinent part. "Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution. . . ."

lead counsel in state court proceedings does not go forward as lead counsel in federal court proceedings. That is precisely the situation here. Lead counsel throughout the state court proceedings in the instant case was Doron Weinberg. Denise Kendall became associated with the case after Appellant's Opening Brief and Appellant's Reply Brief were filed and when the majority of the work on the case had been completed. Denise Kendall was never lead counsel in the state court proceedings. (See Declaration of Denise Kendall, attached hereto and incorporated herein.)

It should be noted that the rule authorizes a stay in a situation in which lead counsel does not go forward. It does not preclude a stay where lead counsel does not go forward. Thus the Court is still free to grant a stay to continuing counsel upon a showing of good cause. That is the case here. Denise Kendall did participate in discrete portions of the case in the state court proceedings. She was never appointed by the State Supreme Court to represent Petitioner, but merely worked on portions of the case at the behest of and under the direction of appointed lead counsel Doron Weinberg. Her work on the case began after the majority of the preparation of the case was completed in state court. Because she was not lead counsel, she did not have the authority or decision-making power necessary to prepare her to continue as lead counsel in federal court. Denise Kendall did not participate in the preparation of the case in state court to the extent that would enable her to file forthwith a petition in federal court. (See Declaration of Denise Kendall.)

Respondent relies on the case of In re Parker, 49 F.3d 204 (6th Cir. (1994) for the proposition that a district court's stay of execution must be vacated where "counsel [is] familiar with and previously of record." (Respondent's Motion, p. 5.) Respondent, however, obfuscates the true import of that court's ruling which is that a federal court stay of execution cannot be invoked in order to pursue additional state court remedies. In re Parker, supra, at 627. In that case the petitioner underwent two rounds of state appellate court proceedings with the same counsel. He then obtained a stay in federal court in order to attack the effectiveness of that

counsel again through a state court proceeding. The court's holding was not premised on the fact that he had the same counsel continuing from state to federal court, but rather that petitioner sought the aid of a federal stay of execution to allow him to delay his resort to federal court "while he goes on to file yet additional proceedings in the state court." Id. at 626. In the present case, Petitioner has sought a stay of execution before this Court in order to become familiar with the entire state court record, investigate the case, and prepare the petition for writ of habeas corpus.

Counsel has prepared and is filing simultaneously with this Opposition a specification of non-frivolous issues as contemplated by Rule 191(h)(3).

CONCLUSION

For all the foregoing reasons Petitioner respectfully requests this Court deny Respondent's motion to vacate the stay of execution.

Dated: 8/14/95

Respectfully submitted,

LYNNE S. COFFIN

DENISE KENDALL

Counsel for Petitioner
ROBERT FREDERICK GARCEAU

LYNNE S. COFFIN, State Bar No. 121389
CALIFORNIA APPELLATE PROJECT
One Ecker Place, Suite 400
San Francisco, California 94105
Telephone: 415/495-0500

DENISE KENDALL, State Bar No. 120802
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862 Sir Francis Drake, No. 301
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Telephone: (415) 258-0296

Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

ORIGINAL
FILED

SEP 19 1995

CLERK, U. S. DIST. COURT
Eastern District of California

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV-F-5363-OWW-P SUPPLEMENTAL DECLARATION OF LYNNE S. COFFIN FILED IN SUPPORT OF PETITIONER'S OPPOSITION TO MOTION TO VACATE STAY OF EXECUTION

TO: THE HONORABLE OLIVER W. WANGER, JUDGE OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA:

Petitioner respectfully requests this Court to file the appended Declaration of Lynne S. Coffin in Support of Petitioner's Opposition to Motion to Vacate Stay of Execution presently set to

/ / /

/ / /

/ / /

be heard before this Court on October 2, 1995.

DATED: September 18, 1995

CALIFORNIA APPELLATE PROJECT

BY: _____
LYNNE S. COFFIN
Supervising Staff Attorney

ATTORNEYS FOR PETITIONER
Robert Frederick Garceau

DECLARATION OF ATTORNEY LYNNE S. COFFIN

I, Lynne S. Coffin, declare as follows:

1. I am a member of the State Bar of California and a Supervising Staff Attorney at the California Appellate Project (CAP).

2. On June 16, 1995, this Court appointed the California Appellate Project as co-counsel for Petitioner with Denise Kendall, Esq. Since that time, I have been the attorney at CAP who has been assigned to represent petitioner. In that capacity, I have, with Denise Kendall, begun a review of the record, instituted the pre-petition investigation, and filed the necessary pleadings.

3. Prior to being hired at CAP in June, 1991, I was an associate in the San Francisco law firm of Larson and Weinberg. While at Larson and Weinberg, I worked on petitioner's automatic appeal to the California Supreme Court. Doron Weinberg, my supervisor, and I, read the trial record in this case, and under Mr. Weinberg's supervision, I drafted Appellate's Opening Brief, which Mr. Weinberg finalized and argued to the California Supreme Court. At no time was I appointed by the California Supreme Court to represent petitioner.

4. I was also involved, again, as an associate under the direction and supervision of Mr. Weinberg, in the development of issues to be raised in the habeas corpus petition to be filed in the California Supreme Court. However, I had already left the employ of Mr. Weinberg by the time decisions concerning the issues to be included in the habeas corpus petition were made, and the habeas corpus petition was actually drafted. I did not take part

in the most important aspects of the filing of this petition.

5. Moreover, the staff attorney at the California Appellate Project who was assigned to assist Mr. Weinberg was Gary D. Sowards. Until recently, Mr. Sowards was the attorney at CAP who was involved in whatever decisions were made concerning this case. I again became involved in the case only shortly before this Court appointed CAP as co-counsel.

6. Based on my prior involvement in this case, I do have a familiarity with the state court record and some of the investigation which was conducted while the case was pending in state court. However, I reviewed that record over five years ago. Additionally, I was not involved in the most important aspects of the preparation of the state habeas corpus petition and thus must complete a review of the investigation conducted in state court, as well as the investigation that remains to be done prior to the filing of the federal petition.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 18, 1995

LYNNE S. COFFIN

DECLARATION OF SERVICE

Re: GARCEAU V. CALDERON, CV-F-5363-OWW-P

I, Katherine Hollander, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at One Ecker Place, Suite 400, San Francisco, California 94105.

I served the attached:

SUPPLEMENTAL DECLARATION OF LYNNE S. COFFIN IN SUPPORT OF PETITIONER'S OPPOSITION TO MOTION TO VACATE STAY OF EXECUTION

on the following individuals/entities by placing true and correct copies of the documents in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Lizabeth Bellett
Deputy Attorney General
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Gales S. Enstad
County Clerk
Kern County Civic Center
1415 Truxton Avenue
Bakersfield, CA 93301

Edward Jagels
District Attorney
Kern County
1215 Truxton Avenue
Bakersfield, CA 93301

Robert F. Garceau
D-39413
San Quentin State Prison
San Quentin, CA 94974

All parties that are required to be served have been served.

I declare under penalty of perjury that service was effected on September 18, 1995 at San Francisco, California and that this declaration was executed on September 18, 1995 at San Francisco, California.

Katherine Hollander
KATHERINE HOLLANDER

ORIGINAL FILED
OCT 13 1995
CLERK, U.S. DIST. COURT
Eastern District of C...

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner, v. ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	No. CV-F-95-5363-OWW-P DEATH PENALTY CASE ORDER DENYING MOTION TO VACATE STAY OF EXECUTION, APPOINTING COUNSEL, SETTING DATES

The motion of Respondent to vacate the stay of execution issued by this court on June 16, 1995, was heard on October 2, 1995. The motion was denied on the ground that neither counsel appointed to represent petitioner had had the primary responsibility or control over the proceedings in the state court in which they worked on petitioner's behalf. Therefore, this court found the stay properly entered under Rules of Court 191(h)(3).

As a related issue the court, over respondent's objection, granted petitioner's request that the petition be filed no later than nine months from the date of this hearing. This motion was granted on two conditions: first, that the petition be filed sooner if possible and, second, that no further stays would

be granted absent a showing of exceptional circumstances by petitioner.

A telephonic status conference was ordered held on December 4, 1995 at 9:00 a.m.

Because of circumstances involving the California Appellate Project, the court relieved that project as second counsel in this proceedings and appointed Lynne Coffin pursuant to Rule 191(d)(2).

Dated: OCT 10 1995

OLIVER W. WANGER
OLIVER WANGER
United States District Judge

DECLARATION OF SERVICE BY MAIL

Re: Garceau v. Calderon **No.** CV-F-95-5363-OWW-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

ORDER DENYING MOTION TO VACATE STAY OF EXECUTION, APPOINTING COUNSEL, SETTING DATES

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Denise Kendall, Esq.
Lynne Coffin, Esq.
862 Sir Francis Drake, No. 301
San Anselmo, CA 94960

Mr. Robert F. Garceau
D-39413
San Quentin Prison
Tamal, CA 94974

Honorable Gale S. Enstad
Clerk, Kern County
1415 Truxtun Avenue
Bakersfield, CA 93301

Arthur Calderon, Warden
San Quentin Prison
San Quentin, CA 94964

Jerri Curtis
Capitol Case Coordinator
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Michael G. Millman, Esq.
Staff Attorney
Calif. Appellate Project
One Ecker Place, Ste 400
San Francisco, CA 94105

Arthur Ruthenback, Esq.
Federal Defender
801 K Street
Sacramento, CA 95814

Edward Jagels, Esq.
Kern Co. District Attorney
1415 Truxtun Ave.
Bakersfield, CA 93301

Each said envelope was then, on October 4, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 4, 1995, at Sacramento, California.

DECLARANT

FILED
NOV - 8 1995
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU,

Petitioner,

vs.

ARTHUR CALDERON, Warden of San Quentin State Prison,

Respondent.

No. CV-F-95-5363-OWW-P

DEATH PENALTY CASE

ORDER GRANTING EXTENSION OF TIME TO FILE CASE BUDGET AND STAY OF EXECUTION

On November 7, 1995, Petitioner filed an ex parte application for extension of time to file the initial funds request and case budget. On July 10, 1995, an order was issued setting the due dates for the initial funds request and the case budget on October 4 and 24, respectively. On September 15, 1995, Petitioner requested a 30 day extension for each filing. At the October 2, 1995 hearing, Petitioner's counsel represented to this Court the case budget could be filed within the next 30 days, notwithstanding the transition in process at CAP. Petitioner now requests an additional 30 days, until November 25, to file the initial funds request and 60 days, until December 24, to file the case budget.

IT IS ORDERED that Petitioner shall file his initial funds request by November 17, 1995, and shall file his case budget by November 27, 1995.

#31

IT IS FURTHER ORDERED that the telephonic status conference shall be held on December 4, 1995, at 9 a.m., as set at the October 2, 1995, hearing.

IT IS FURTHER ORDERED that Petitioner is granted a second temporary stay of execution for one hundred twenty (120) days from the date of this order to prepare and file his amended petition. Local Rule 191(h)(3).

DATED: November 8, 1995

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
November 9, 1995

* * CERTIFICATE OF SERVICE * *

1:95-cv-05363

Garceau

v.

Calderon

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 9, 1995, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Denise Kendall
Law Office of Denise Kendall
862 Sir Francis Drake
Suite 301
San Anselmo, CA 94960

Lynne S Coffin
Coffin and Love
345 Franklin Street
San Francisco, CA 94102

John Adrian Gordnier
14th Floor
U S Attorney's Office
P O Box 944255
1300 I Street
Suite 125
Sacramento, CA 94425

Jack L. Wagner, Clerk

By: [illegible] Deputy Clerk

FILED
DEC 19 1995
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU,

Petitioner,

vs.

ARTHUR CALDERON, Warden of San Quentin State Prison,

Respondent.

No. CV-F-95-5363-OWW-P

DEATH PENALTY CASE

ORDER REGARDING FILING OF PETITION FOR WRIT OF HABEAS CORPUS AND ANSWER

A telephonic status conference was held before Judge Oliver W. Wanger on December 4, 1995. Appearances were made by Lynn Coffin and Denise Kendall for Petitioner, and by John A. Gordiner for Respondent. The parties agreed to the following time limits.

IT IS ORDERED Petitioner will file his federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on or before July 2, 1996.

IT IS FURTHER ORDERED that Respondent shall file an answer or otherwise plead to the petition in accordance with Rule 4 of the Rules Governing § 2254 Cases and Local Rule 191(i)(3) within 60 days after the filing of the petition, or by September 2, 1996.

#44

IT IS FURTHER ORDERED Petitioner will initiate a telephonic status conference between the parties and the court on September 17, 1996, in order to schedule further dates in this case.

DATED: December 14, 1995

Oliver W. Wanger
United States District Judge

lm

United States District Court
for the
Eastern District of California
December 19, 1995

* * CERTIFICATE OF SERVICE * *

1:95-cv-05363

Garceau

v.

Calderon

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 19, 1995, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Denise Kendall
Law Office of Denise Kendall
862 Sir Francis Drake
Suite 301
San Anselmo, CA 94960

Lynne S Coffin
Coffin and Love
345 Franklin Street
San Francisco, CA 94102

John Adrian Gordnier
14th Floor
U S Attorney's Office
P O Box 944255
1300 I Street
Suite 125
Sacramento, CA 94425

LG

Jack L. Wagner, Clerk

By: Deputy Clerk

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
JOHN A. GORDNIER (State Bar #45250)
Senior Assistant Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5169

Attorneys for Respondent

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner,	No. CV-F-95-5363-OWW-P **DEATH PENALTY CASE**
ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	OPPOSITION TO A TEMPORARY STAY TO OCTOBER 7, 1996

TO THE HONORABLE OLIVER W. WANGER, JUDGE OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA:

In an ex parte application for stay of execution served on Respondent on May 30, 1996, Petitioner asks that the stay due to expire on June 7, 1996, be extended until July 2, 1996, or, in the alternative, to October 7, 1996.

In its order issued October 10, 1995, this Court stated that the petition was to be filed within nine months from the date of hearing (July 2, 1996). It was also the order of the court that no further stays beyond that date would be permitted "absent a showing of exceptional circumstances by petitioner." The documents offered as part of the ex parte application make no showing of any

exceptional circumstances.

Local Rule 191(h)(1) provides that once the petition is filed the matter is stayed until the matter is finally resolved. Because the petition is to be filed by July 2, 1996, no temporary stay beyond that date needs to be granted.

Respondent has no objection to an extension of the present stay order due to expire June 7, 1996, for twenty-eight (28) days to and including July 2, 1996. Respondent has prepared a proposed order which, respondent believes, more nearly complies with the rules than either of the proposed orders offered by Petitioner; Respondent urges the Court to sign this proposed order.

By way of argument, Respondent would point out that in her reply to the earlier motion to vacate filed by Respondent, counsel for Petitioner specified only two issues as "non-frivolous." The nature of these issues are such that the intervening time since August, 1995, has been more than ample to properly research these issues and prepare a petition. No temporary stay which would extend the potential filing date of the petition is justified or necessary.

DATED: June 4th, 1996

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General

JOHN A. GORDNIER
Senior Assistant Attorney General

Attorneys for Respondent

JAG:ss
SAPS1997003

DECLARATION OF SERVICE BY MAIL

Re: Garceau v. Calderon No. CV-F-95-5363-OWW-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

OPPOSITION TO A TEMPORARY STAY TO OCTOBER 7, 1996

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Denise Kendall, Esq.
Lynne Coffin, Esq.
862 Sir Francis Drake, No. 301
San Anselmo, CA 94960

Mr. Robert F. Garceau
D-39413
San Quentin Prison
Tamal, CA 94974

Honorable Gale S. Enstad
Clerk, Kern County
1415 Truxtun Avenue
Bakersfield, CA 93301

Arthur Calderon, Warden
San Quentin Prison
San Quentin, CA 94964

Jerri Curtis
Capitol Case Coordinator
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Michael G. Millman, Esq.
Staff Attorney
Calif. Appellate Project
One Ecker Place, Ste 400
San Francisco, CA 94105

Arthur Ruthenback, Esq.
Federal Defender
801 K Street
Sacramento, CA 95814

Edward Jagels, Esq.
Kern Co. District Attorney
1415 Truxtun Ave.
Bakersfield, CA 93301

Each said envelope was then, on June 4, 1996, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 4, 1996, at Sacramento, California.

Anita Sandlin
DECLARANT

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
JOHN A. GORDNIER (State Bar #45250)
Senior Assistant Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5169

Attorneys for Respondent

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner, v. ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	No. CV-F-95-5363-OWW-P **DEATH PENALTY CASE** [PROPOSED] ORDER STAYING EXECUTION [Rules 191(h)(1) & 191(h)(3)]

On May 12, 1995, this Court entered an Order staying the execution of Petitioner for forty-five days to permit appointment of counsel for Petitioner. This order was requested on behalf of Petitioner by Doron Weinberg and Denise Kendall. The Court deferred the matter to the Selection Board for its recommendation of one or more counsel to be appointed to represent Petitioner. The Selection Board recommended the appointment of the California Appellate Project and Denise Kendall as counsel to represent Petitioner. The appointment of Lynne S. Coffin as lead counsel was in her capacity as a staff attorney at the California Appellate Project. Thereafter, on June 16, 1995, this Court ordered a temporary stay of execution for one hundred twenty (120) days for

Petitioner to prepare and file his petition for writ of habeas corpus.

Subsequently, Respondent filed a Motion to Vacate the Stay of Execution which was denied after hearing on October 2, 1995. The Court ordered that the Petition for Writ of Habeas Corpus be filed on July 2, 1996 or sooner if possible, and stated that no further stays would be granted subsequent to July 2, 1996, absent a showing of exceptional circumstances by Petitioner. This court also relieved the California Appellate Project as counsel and appointed Lynne Coffin pursuant to Rule 191(d)(2).

Further stays have been requested by Petitioner and good cause appearing, ordered by this Court every one hundred twenty (120) days, the last one to expire on June 7, 1996.

On May 30, 1996, Counsel filed an application requesting a stay pending resolution of the petition which will be filed on or before July 2, 1996, in compliance with this Court's order.

Accordingly, good cause appearing, it is hereby ordered that the present stay of execution which would expire June 7, 1996, shall be extended for twenty-eight (28) days to and including July 2, 1996 (Rule 191(h)(3), see specifically the last sentence of the Rule). Petitioner has been ordered to file his petition on or before July 2, 1996. Upon the filing of the petition, the execution shall be stayed by Rule 191(h)(1) until the matters raised in the petition are finally resolved.

The Clerk of the Court shall give immediate telephonic notice to Respondent, Arthur Calderon, Warden of the San Quentin Prison, that Petitioner's execution is stayed by Order of this

Court. The Clerk of the Court shall also serve a copy of this order on Respondent, Arthur Calderon, Warden of the San Quentin Prison, San Quentin, California; Michael Millman, California Appellate Project; and the Attorney General of the State of California.

IT IS SO ORDERED.

DATED:

OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

Presented by:

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General

By:
JOHN A. GORDNIER
Senior Assistant Attorney General

Attorneys for Respondent

JAG:ms
SA95XV0003

DECLARATION OF SERVICE BY MAIL

Re: Garceau v. Calderon No. CV-F-95-5363-OWW-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

[PROPOSED] ORDER STAYING EXECUTION
[Rules 191(h)(1) & 191(h)(3)]

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Denise Kendall, Esq. Lynne Coffin, Esq. 862 Sir Francis Drake, No. 301 San Anselmo, CA 94960	Jerri Curtis Capitol Case Coordinator Ninth Circuit Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939
Mr. Robert F. Garceau D-39413 San Quentin Prison Tamal, CA 94974	Michael G. Millman, Esq. Staff Attorney Calif. Appellate Project One Ecker Place, Ste 400 San Francisco, CA 94105
Honorable Gale S. Enstad Clerk, Kern County 1415 Truxtun Avenue Bakersfield, CA 93301	Arthur Ruthenback, Esq. Federal Defender 801 K Street Sacramento, CA 95814
Arthur Calderon, Warden San Quentin Prison San Quentin, CA 94964	Edward Jagels, Esq. Kern Co. District Attorney 1415 Truxtun Ave. Bakersfield, CA 93301

Each said envelope was then, on June 4, 1996, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 4, 1996, at Sacramento, California.

Carla Sandlin
DECLARANT

LYNNE S. COFFIN, State Bar No. 121389
LAW OFFICES OF COFFIN & LOVE
345 Franklin Street
San Francisco, California 94102
Telephone: (415) 241-1169

DENISE KENDALL, State Bar No. 120802
LAW OFFICE OF DENISE KENDALL
862 Sir Francis Drake, No. 301
San Anselmo, California 94960
Telephone: (415) 258-0296

Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

COPY

ORIGINAL
FILED
JUL 02 1996
CLERK, U.S. DIST. COURT
Eastern District of Calif.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU,

Petitioner.

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV-F-95-5363-OWW-P

EX PARTE APPLICATION FOR STAY OF EXECUTION PENDING FINAL DISPOSITION OF HABEAS CORPUS PETITION

[Local Rule 191(h)(1)]

TO THE HONORABLE OLIVER W. WANGER, JUDGE OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA:

Petitioner Robert Frederick Garceau, through his attorney, Lynne S. Coffin, hereby applies for a stay of his execution pending final disposition of his habeas petition which has been filed contemporaneously with this application, on July 2, 1996, in accordance with Local Rule 191(h)(1)

and in compliance with this Court's previous orders.

DATED: July 1, 1996

Respectfully submitted.

LYNNE S. COFFIN
LAW OFFICES OF COFFIN & LOVE

DENISE KENDALL
LAW OFFICE OF DENISE KENDALL

By: _____
LYNNE S. COFFIN
Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

Grounds for Application

The grounds for this application are as follows:

1. Petitioner was sentenced to death in Kern County Superior Court on July 30, 1987, Case No. 29601. The California Supreme Court affirmed the judgment of death in People v. Garceau (Case No. S004776) on November 18, 1993 and the United States Supreme Court denied Petitioner's petition for writ of certiorari on October 3, 1994.

2. On May 12, 1995 this Court entered an Order staying the execution of Petitioner for forty-five days to permit appointment of counsel for Petitioner. This order was requested on behalf of Petitioner by Doron Weinberg and Denise Kendall. The Court referred the matter to the Selection Board for its recommendation of one or more counsel to be appointed to represent Petitioner. The Selection Board recommended the appointment of the California Appellate Project and Denise Kendall as counsel to represent Petitioner. The appointment of Lynne S. Coffin as lead counsel was in her capacity as a staff attorney at the California Appellate Project. Thereafter, on June 16, 1995, this Court ordered a temporary stay of execution for one hundred twenty (120) days for Petitioner to prepare and file his petition for writ of habeas corpus.

3. Subsequently, Respondent filed a Motion to Vacate the Stay of Execution which was denied after hearing on October 2, 1995. The Court ordered that the Petition for Writ of Habeas Corpus be filed on July 2, 1996 or sooner if possible, and stated that no further stays would be granted subsequent to July 2, 1996, absent a showing of exceptional circumstances by Petitioner. This court also relieved the California Appellate Project as counsel and appointed Lynne Coffin.

4. Further stays have been requested by Petitioner and good cause appearing, ordered by this Court every one hundred twenty (120) days, the last one to expire on July 2, 1996. Counsel now request a stay, in accordance with Local Rule 191(h)(1), pending resolution of the Petition which has been filed contemporaneously.

WHEREFORE, Petitioner respectfully requests that this Court issue a stay of Petitioner's

execution pending resolution of his Petition for Habeas Corpus filed on July 2, 1996.

DATED: July 1, 1996

Respectfully submitted,

LYNNE S. COFFIN
LAW OFFICES OF COFFIN & LOVE

DENISE KENDALL
LAW OFFICE OF DENISE KENDALL

BY: _____
LYNNE S. COFFIN
Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

LYNNE S. COFFIN, State Bar No. 121389
LAW OFFICES OF COFFIN & LOVE
345 Franklin Street
San Francisco, California 94102
Telephone: (415) 241-1169

DENISE KENDALL, State Bar No. 120802
LAW OFFICE OF DENISE KENDALL
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Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DEATH PENALTY CASE

ROBERT FREDERICK GARCEAU,

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV-F-5363-OWW-P

PROOF OF SERVICE

DECLARATION OF SERVICE

Re GARCEAU V. CALDERON, CVF-95-5363-OWW-P

I, Siobhan Noble, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 345 Franklin Street, San Francisco, California 94102.

I served the attached:

1. EX PARTE APPLICATION FOR STAY OF EXECUTION PENDING RESOLUTION OF HABEAS CORPUS PETITION;

2. [PROPOSED] ORDER STAYING EXECUTION

on the following individuals/entities by placing true and correct copies of the documents in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

John Adrian Gordnier
14th Floor
Attorney General's Office
P.O. Box 944255
1300 I Street
Suite 125
Sacramento, CA 94425

All parties that are required to be served have been served.

I declare under penalty of perjury that service was effected on July 2, 1996, at San Francisco, California and that this declaration was executed on July 2, 1996, at San Francisco, California.

Siobhan Noble

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LAW OFFICES OF COFFIN & LOVE
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DENISE KENDALL, State Bar No. 102802
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Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

LODGED
JUL 02 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT F. GARCEAU, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent.	**DEATH PENALTY CASE** CASE NO. CV-F-95-5363-OWW-P [PROPOSED] ORDER STAYING EXECUTION [Rule 191(h)(1)]

On May 12, 1995 this Court entered an Order staying the execution of Petitioner for forty-five days to permit appointment of counsel for Petitioner. This order was requested on behalf of Petitioner by Doron Weinberg and Denise Kendall. The Court referred the matter to the Selection Board for its recommendation of one or more counsel to be appointed to represent Petitioner. The Selection Board recommended the appointment of the California Appellate Project and Denise Kendall as counsel to represent Petitioner. The appointment of Lynne S. Coffin as lead counsel was in her capacity as a staff attorney at the California Appellate Project. Thereafter, on June 16, 1995, this Court ordered a temporary stay of execution for one hundred twenty (120) days for Petitioner to prepare and file his petition for writ of habeas corpus.

Subsequently, Respondent filed a Motion to Vacate the Stay of Execution which was denied after hearing on October 2, 1995. The Court ordered that the Petition for Writ of Habeas Corpus be

filed on July 2, 1996 or sooner if possible, and stated that no further stays would be granted subsequent to July 2, 1996, absent a showing of exceptional circumstances by Petitioner. This court also relieved the California Appellate Project as counsel and appointed Lynne Coffin pursuant to Rule 191(d)(2).

Further stays have been requested by Petitioner and good cause appearing, ordered by this Court every one hundred twenty (120) days, the last one to expire on July 2, 1996.

On July 2, 1996, in accordance with this Court's previous orders, Petitioner filed a Petition for Writ of Habeas Corpus.

Accordingly, good cause appearing, it is hereby ordered that the execution be stayed pending resolution of the petition pursuant to Rule 191(h)(1). The Warden of San Quentin Prison is ordered to stay the execution of Robert Frederick Garceau and all proceedings related thereto, and to stay the scheduling of any other execution date until resolution of the petition, unless extended by the Court.

The Clerk of the Court shall give immediate telephonic notice to respondent, Arthur Calderon, Warden of the San Quentin Prison, that Petitioner's execution is stayed by Order of this Court,. The Clerk of the Court shall also serve a copy of this order on respondent, Arthur Calderon.

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//

Warden of the San Quentin Prison, San Quentin, California, Michael Millman, California Appellate Project; and the Attorney General of the State of California.

IT IS SO ORDERED.

DATED:

OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

Presented by:

LYNNE S. COFFIN
LAW OFFICES OF COFFIN & LOVE

DENISE KENDALL
LAW OFFICE OF DENISE KENDALL

By: _____
LYNNE S. COFFIN
Attorneys for Petitioner
ROBERT FREDERICK GARCEAU

82

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

PEOPLE OF THE STATE OF CALIFORNIA vs ROBERT FREDERICK GARCEAU No CR 11328 Date 1/13/85

Present

John M. Phillips Judge
LaVonne Poncetta Clerk
Connie Love Reporter
Jess Hancock Bailiff

Present Before the Court

X Defendant present
X DDA Michael Bartram
X DPD Fred Herro
X DPD Daniel Towle

Witnesses Sworn

Case regularly called for sentencing. Court has read and considered report and recommendation of probation officer and diagnostic report if any.
The court finds that defendant has been convicted of Ct I, vio of H&S Code Sec 11379, Manufacture of Methamphetamine; Ct. II, vio of H&S Code Sec 181/11379, Conspiracy to Manufacture Methamphetamine; Ct III, vio of P.C. Sec 12025(a), Felon in Possession of Concealable Firearm in Vehicle; Ct IV, vio of P.C. Sec 12021, Felon in Possession of Concealat Firearm on his Person; Ct VI, vio of P.C. Sec 187, Murder in the 1st Degree, w/personal use of a firearm w/in meaning of P.C. Sec 12022.5, each a felony.

Court determines that Defendant ( ) is (X) is not a suitable candidate for probation ( ) grants (X) denies probation, and states reasons

SENTENCE CHOICE: Count I, II, III, IV & VI

☒ Court considers entire record and other competent evidence, and finds in each Count
X circumstances in
(X) aggravation outweigh circumstances in mitigation
( ) mitigation outweigh circumstances in aggravation
( ) aggravation and mitigation are substantially equal
— no evidence presented or statements submitted in aggravation or mitigation

and imposes ( ) middle (X) upper ( ) lower term of 4 years each, in Cts I & II, Ct II stayed per
pursuant to (X) preceding finding ( ) stipulation ( ) negotiated plea and states reasons P.C. Sec 654; term of 3 yrs each in Cts III & IV, to run consecutive to Ct I and to each other - excess over 1/3 the middle term as to Cts III & IV stayed pending completion of sentence in Ct I, at which time sta becomes permanent. Ct VI, 25 yrs to life, w/ possibility of parole, plus 2 yrs for 12022.5 P.C. enhancement, to run consecutive to Cts I, III & IV. Total term - 32 yrs 4 mos to life.

☒ Court determines that the crime with the greatest principal term is Count I
☐ Counts _____ on attached page

JUDGMENT: X Defendant waives formal arraignment for judgment. X ( ) shows no legal cause why judgment should not be pronounced
Judgment is pronounced as follows

☐ IMPOSITION OF SENTENCE SUSPENDED FOR _____ YEARS, on terms of attached probation order
☒ DEFENDANT IS SENTENCED TO

(Cts 1,2,3 & 4)

___ Co. jail for _____, all but _____ days suspended
X Credit for time served found to be 411 days, of which _____ days were served in custody of Dept. of Corrections
___ EXECUTION OF SENTENCE SUSPENDED FOR _____ YEARS, on terms of attached probation order

X (X) State prison ( ) Youth Authority for 5 yrs 4 mos
+ 27 yrs to life for Ct 6 - total of 32 yrs
( ) Diagnostic report ordered per 1170(d) PC 4 mos to life.
X Sentence to run (X) consecutive ( ) concurrent
(X) to one another ( ) to any prior incomplete sentence.

___ Defendant accepts terms of probation
___ Bail is ( ) reinstated ( ) exonerated
( ) in the amount of _____ 15 days hereafter per 1303 PC
___ Bench Warrant dated _____ is recalled
___ Count _____
dismissed ( ) pursuant to plea bargain
( ) on grounds of _____
___ Defendant is found _____ able to pay costs of court appointed counsel
( ) ordered to pay $ _____
through Monterey County Collections Department
___ Work furlough is _____ recommended

X Defendant is
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
after expiration of sentence
X Advised of appeal rights
___ Handed a copy of probation order
___ To remain on bail/own recognizance
___ Remanded to custody of Sheriff
( ) for processing for release
X ( ) delivery to Calif Med Facility-Vacaville

_____
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

. . . . . .

The People of the State of California Plaintiff Against ROBERT FREDERICK GARCEAU, Defendant	No. 29601 **AMENDED** INFORMATION ENTERED 1-24

ROBERT FREDERICK GARCEAU is accused by the District Attorney of the said County of Kern by this information, of the crime of Felony, in two counts, to wit: First, Second Counts: Murder, in violation of Section 187 of the Penal Code, committed as follows:

FIRST COUNT

That said ROBERT FREDERICK GARCEAU, on or about and between September 1, 1984 and September 30, 1984, at and in said County of Kern, State of California, did willfully, unlawfully and with malice aforethought murder Maureen Farrell Bautista, a human being, in violation of Section 187 of the Penal Code, a felony.

IT IS FURTHER ALLEGED that in the commission and attempted commission of the above offense, the defendant, ROBERT FREDERICK GARCEAU, personally used a deadly and dangerous weapon, to wit: a knife, said use not being an element of the above offense, within the meaning of Penal Code Section 12022(b).

IT IS FURTHER ALLEGED that the defendant, ROBERT FREDERICK GARCEAU, was previously convicted of murder in the first degree in the Superior Court of Monterey County on November 27, 1985, within the meaning of Penal Code Section 190.2(a)(2).

IT IS FURTHER ALLEGED that the murder of Maureen Farrell Bautista was committed by the defendant, ROBERT FREDERICK GARCEAU, and, in addition to such murder, said defendant is now being charged with having murdered and has murdered Telesforo Bautista on and about the same date, within the meaning of Penal Code Section 190.2(a)(3).

(3) COPY

No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
SEP 23 2002
OFFICE OF THE CLERK

JEANNE WOODFORD, Warden, *Petitioner*,

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1862

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ARGUMENT

I.

THE ISSUE OF THE APPROPRIATE TRIGGER EVENT FOR DETERMINING THE APPLICABILITY OF THE AEDPA TO A CAPITAL CASE INVOLVES A SPLIT IN THE CIRCUIT COURTS AND IS AN IMPORTANT MATTER FOR THIS COURT TO RESOLVE

Contrary to allegations made in Respondent's Brief in Opposition, the issue of the appropriate trigger event for determining the applicability of the Anti-terrorism and Effective Death Penalty Act (AEDPA) is an important issue for this Court to decide in order to resolve a split in the federal circuit courts.

This Court should take this opportunity to correct the Ninth Circuit's erroneous legal analysis in *Calderon v. United States District Court* (*Kelly*), 163 F.3d 530 (9th Cir. 1998) (en

banc). The Ninth Circuit's position is in conflict with all of the other circuit courts to consider the issue. While the impact of the Ninth Circuit's erroneous position affects a finite number of cases, those cases involve significant state capital convictions. The effect of the Ninth Circuit's faulty analysis is amply demonstrated by the result in *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001). The reversal of this state capital conviction could not have occurred if the provisions of AEDPA had been properly applied.

Respondent raises a meritless claim that havoc and chaos will result from the Court's resolution of this issue. Assuming the Court agrees with Petitioner, the cases affected should exist primarily in the Ninth Circuit, since the other circuits with published opinions use an approach consistent with that advocated by Petitioner. An opinion by this Court resolving this split will provide helpful guidance to all other circuits. This Court's opinion would have little, if any, disruption on cases in progress, given the fact that the decisions of the district court are reviewed *de novo* by the circuit court. The circuit court would be able to properly apply the appropriate AEDPA provisions if they were not applied in the district court. There would be no effect on cases already final. On the other hand, if this Court disagreed with Petitioner, the result would be the continuance of the current status quo.

Respondent's argument regarding the propriety of the Ninth Circuit's reasoning in *Kelly* simply mirrors Ninth Circuit's reasoning and demonstrates the split in reasoning between that circuit and every other circuit to consider the issue, including most recently the Eleventh Circuit in *Isaacs v. Head*, 300 F.3d 1232, n.1 (11th Cir. 2002). Petitioner's position is that *Kelly*'s reliance on *Hohn v. United States*, 524 U.S. 236 (1998), and *McFarland v. Scott*, 512 U.S. 849 (1994), is misplaced. These cases simply do not address what constitutes a pending habeas corpus proceeding for purposes of determining the applicability of the AEDPA. *Moore v. Gibson*, 195 F.3d 1152, 1162 (10th Cir. 1999). Similarly, *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) does not support

Respondent's argument. *Slack* is an extension of this Court's analysis in *Hohn*, regarding the effect of the filing of certificates of appealability. It is inapplicable to the present situation for the same reason that *Hohn* is inapplicable.

One argument made in the petition for writ of certiorari was that a request for appointment of counsel and stay of execution do not involve a adversarial proceeding, and, therefore, do not constitute a pending case for determining the application of AEDPA. The concept of "pending case" has been properly construed to require the equivalent of a collateral attack on a criminal judgement, *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999), and "true adversary proceedings," *Kelly*, 163 F.3d at 545, dissenting opinion of Judge Hall. Petitioner continues to take this position.

Respondent asserts that the motion for stay of execution was in fact adversarial because opposition papers were filed. In the present case, Petitioner's counsel filed an opposition to the stay of execution when it appeared that Garceau's counsel failed to comply with the minimal requirements necessary to justify the stay of execution granted. (Appendix to Respondent's Brief in Opposition, at 215-24.) The deficiencies were immediately addressed and the stay continued in place. (Appendix to Respondent's Brief in Opposition, at 234-41.) Later, Petitioner's counsel filed a document entitled, "Opposition to Temporary Stay" which agreed with the requested temporary stay but asked that no future extension be granted due to a lack of extraordinary circumstances. (Appendix to Respondent's Brief in Opposition, at 248-54.) The nature of these filings did not transform the stay of execution proceedings into an adversarial proceeding.

II.

THIS COURT SHOULD ADDRESS THE *TEAGUE* ISSUE AND RESOLVE THE SPLIT IN THE CIRCUITS

Respondent's petition for writ of certiorari clearly states that where an issue under *Teague v. Lane*, 489 U.S. 288 (1989) has not been raised by the prosecution, its application is discretionary. In the present case, Respondent did not assert *Teague* until the filing of the petition for rehearing and petition for writ of certiorari. However, it is Respondent's position that the circumstances which existed in *Garceau* require a different analysis. In this case, the federal court was expressly on notice of *Teague*'s application from sources other than the prosecution, yet chose to ignore it. The result was the application of a new rule of law which resulted in the reversal of a capital conviction. Respondent asks this Court to find that, under such circumstances, it was an abuse of discretion for the Ninth Circuit to fail to address *Teague* as a threshold matter.

Respondent also notes *Horn v. Banks*, ___ U.S. ___, 122 S.Ct. 2147 (U.S. June 2002). Horn involved a situation in which *Teague* was properly raised by the prosecution, and so the specific issue in question was not addressed. However, this case speaks to the continued vitality and importance of *Teague*. It is the importance of *Teague* that causes the government to assert that the Ninth Circuit was not free to acknowledge the existence of *Teague* in its opinion, create and apply a new rule of law, fail to address *Teague*, and then reverse a state capital conviction. The court's reasoned decision to ignore the requirements of *Teague* constitutes an abuse of discretion.

The Ninth Circuit's failure to address *Teague* under these circumstances is in conflict with the Fifth Circuit's approach in *Jackson v. Johnson*, 217 F.3d 360, 361-62 (5th Cir. 2000). As that case stated, *Teague* should be applied "absent a compelling, competing interest of justice in a particular case . . . ." The *Jackson* approach to *Teague* should be adopted by this Court.

Lastly, the *Teague* issue is now properly before this Court. It has not been waived as asserted by Respondent. The circumstances present in this case are compelling. The federal court announced a new rule of law and applied it to overturn a state capital conviction. The California Supreme Court, applied existing precedent and found harmless error. The state conviction deserves to be upheld by the federal court. The Court should grant this petition for writ of certiorari and apply the principles of *Teague* to uphold the Court's good faith application of existing law.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: September 23, 2002.

Respectfully submitted,

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Counsel for Petitioner

JSM/mc
SA2002XU0005

Supreme Court, U.S.
FILED
COPY
NOV 18 2002

CAPITAL CASE
No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN, *PETITIONER,*

v.

ROBERT FEDERICK GARCEAU, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 13, 2002
CERTIORARI GRANTED OCTOBER 1, 2002

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NOTATION RE LOCATION OF MATERIALS

The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Ninth Circuit Court of Appeals Opinion
(No. 99-99022) (Filed December 26, 2001) Pet. App. 1-26

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of Probable Cause (United States District Court,
Eastern District of California, No. CIV F-95-5363 OWW P)
(Filed July 30, 1999) Pet. App. 30-101

California Supreme Court Opinion (No. S004776)
(Filed November 18, 1993) Pet. App. 102-179

Supreme Court of the United States

No. 01-1862

Jeanne Woodford, Warden,

Petitioner

v.

Robert Frederick Garceau

ORDER ALLOWING CERTIORARI. Filed October 1, 2002.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 1 presented by the petition.

October 1, 2002

RELEVANT STATE COURT DOCKET ENTRIES

June 15, 1987	Garceau found guilty in Kern County Superior Court case number 29601 of two counts of first degree murder, enhanced with a finding of personal use of a deadly or dangerous weapon. A special circumstances finding based on multiple murders was found true.
June 25, 1987	Jury returned a verdict of death.
July 30, 1987	Formal judgment of death entered.
July 31, 1987	Notice of automatic appeal to the California Supreme Court filed.
Dec. 18, 1989	Garceau's opening brief filed with the California Supreme Court.
May 31, 1990	Woodford's brief on the merits filed with the California Supreme Court.
March 27, 1991	Garceau's reply brief filed with the California Supreme Court.
August 12, 1991	Garceau's habeas corpus petition filed with the California Supreme Court.
September 1, 1993	Garceau's habeas corpus petition denied on the merits.
Nov. 18, 1993	Decision of the California Supreme Court affirming on appeal the conviction and sentence.
January 26, 1994	Garceau's petition for rehearing denied.
October 3, 1994	Garceau's petition for writ of certiorari denied by the United States Supreme Court.

RELEVANT DOCKET ENTRIES FOR UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA CASE NUMBER 95-5363

May 12, 1995	Garceau's request for appointment of counsel and stay of execution filed and granted in order to permit appointment of counsel.
June 26, 1995	Counsel for Garceau appointed and a temporary stay of execution granted to permit the preparation of the petition.
August 1, 1995	Motion by Woodford to vacate stay of execution.
August 14, 1995	Garceau filed a Specification of Non-Frivolous Issues
August 15, 1995	Garceau filed opposition to Woodford's motion to vacate stay of execution.
October 13, 1995	Denial of Woodford's challenge to the issuance of the stay.
July 2, 1996	Garceau's federal habeas corpus petition filed.
July 30, 1999	Order denying petition for writ of habeas corpus.
July 30, 1999	Order denying the issuance of a certificate of probable cause.
January 21, 2000	Certificate of probable cause issued by the Ninth Circuit.

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CASE NUMBER 99-99022

Sept. 10, 1999	Garceau's motion for certificate of probable cause to appeal and application for stay of execution pending appeal.
January 21, 2000	Request for a certificate of probable cause granted. Motion for stay of execution pending disposition of appeal granted.
May 5, 2000	Garceau's opening brief on the merits filed.
Sept. 20, 2000	Woodford's merits brief filed.
October 20, 2000	Reply brief filed.
May 17, 2001	Argued and submitted to Judges O'Scannlain, Tashima, and Thomas.
Dec. 26, 2001	Opinion filed: reversed and remanded. (Terminated on the merits after oral hearing; reversed and remanded; written, signed, published. Judge O'Scannlain, partial concurring and partial dissent; Judge Tashima, author; Judge Thomas, concurring.) Filed and entered judgment.
January 16, 2002	Petition for rehearing filed by Woodford.
February 15, 2002	Filed order. Judges Tashima and Thomas vote to deny the petition for panel rehearing and Judge O'Scannlain votes to grant it. The panel votes to deny the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. See Fed.R.App.P. 35(b). The petition for panel rehearing and the petition for rehearing en banc is denied.

February 25, 2002	Woodford's motion to stay the mandate filed.
February 25, 2002	Order to stay issuance of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The stay is granted pursuant to FRAP 41(d)(2)(B).
June 28, 2002	Received notice from Supreme Court: petition for certiorari filed with the Supreme Court, Case No. 1-1862 filed on 6/13/02.
October 7, 2002	Received letter from the Supreme Court 10/1/02 re: granting in forma pauperis.

(A)

ORIGINAL

FILED
NOV 13 2002
OFFICE OF THE CLERK

No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN, *Petitioner*,

v.

ROBERT FREDERICK GARCEAU, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE
QUESTION PRESENTED

1. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held that Chapter 153 of the Antiterrorism and Effective Death Penalty Act ("the AEDPA") (28 U.S.C. §§ 2241-2255) does not apply to cases pending prior to the AEDPA's April 24, 1996, effective date. The circuits are split as to when a capital case commences for purposes of determining the application of the AEDPA. With one exception, all the circuits to consider the issue have found the AEDPA applies if the petition for habeas corpus relief was filed on or after the AEDPA's effective date. However, in the Ninth Circuit, the AEDPA does not apply to a federal petition filed on or after April 24, 1996, if motions for appointment of counsel and stay of execution were filed before that date. *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). This conflict presents the following question:

What is the correct trigger event for determining the application of the AEDPA in capital cases?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1862

JEANNE WOODFORD, WARDEN, *Petitioner*,

v.

ROBERT FREDERICK GARCEAU, *Respondent*.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") is reported at 275 F.3d 769 (Pet. App. 1-26).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on December 26, 2001. A petition for rehearing was denied on February 15, 2002 (Pet. App. 27-28). On May 8, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 15, 2002. The petition for a writ of certiorari was filed on June 13, 2002, and granted on October 1, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), Chapter 153, 28 U.S.C. §§ 2241-2255 (Pet. App. 180-95), and that provision of Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c), which provides:

> (c) EFFECTIVE DATE. -- Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

The provisions of 28 U.S.C. § 2254(d)(1) and (2), and (e), contained in Chapter 153 of the AEDPA, provide in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> * * *

STATEMENT OF THE CASE

In September 1984, Robert Garceau stabbed to death his girlfriend, Maureen Bautista, and her 14-year-old son, Telesforo Bautista. Their bodies were not found until six months later, in a bedroom dresser buried under a layer of concrete in the backyard of one of Garceau's drug partners, Greg Rambo. Garceau's drug partners testified that he confessed to the murders. They further testified that he had returned to the scene with two of his drug partners and stuffed the bodies into the dresser. Garceau and Greg Rambo then transported the dresser to Rambo 's house and buried it. A few months after the Bautista murders, Greg Rambo was shot to death. (Pet. App. 103-04.)

On June 15, 1987, Robert Garceau was convicted in Kern County Superior Court, California, of two counts of first degree murder, enhanced with a finding of personal use of a deadly or dangerous weapon. A special circumstance finding based on multiple murders was found true. The jury returned a verdict of death. (Pet. App. 102-03.)

The California Supreme Court affirmed the judgment in 1993. (Pet. App. 102-79.) The court held that the trial court erroneously instructed the jury that evidence of Garceau's other crimes ("other-crimes evidence") could be considered as it bore on Garceau's character. However, the court held that the admission of the other-crimes evidence was non-prejudicial under any standard of review and, therefore, it did not need to decide if the instruction constituted a denial of due process.

Garceau filed a petition for a writ of habeas corpus with the California Supreme Court, which was denied on September 1, 1993. Garceau then filed a petition for writ of certiorari with this Court, which was also denied. 513 U.S. 848 (1994).

On May 12, 1995, having completed direct review, Garceau filed an ex parte application for a stay of execution and a request for appointment of federal habeas counsel, pursuant to 21 U.S.C. § 848(q)(4)(B), in the United States District Court for the Eastern District of California. The application stated Garceau's future intention to file a petition for writ of habeas corpus to present "multiple meritorious claims of violations of petitioner's federal constitutional rights." (Resp. App. 203, 205.) By order issued May 12, 1995, the proceedings were stayed to permit appointment of counsel. (Resp. App. 199.) Six weeks later, counsel was appointed and a temporary stay of execution was granted to permit the preparation of the petition. (Resp. App. at 211-12.)

On April 24, 1996, the AEDPA went into effect. Garceau filed a federal petition for a writ of habeas corpus on July 2, 1996, which the district court subsequently denied. (Pet. App. 30-101.) Among its other determinations, the district court applied a presumption of correctness to the California Supreme Court's finding that the erroneous jury instruction permitting the jury to consider Garceau's other-crimes evidence for any purpose, including Garceau's character and propensity to commit murder, constituted harmless error. (Pet. App. 86.)

The Ninth Circuit reversed. As a threshold matter, the court ruled that the AEDPA did not apply to Garceau's petition. Applying the interpretation announced by the Ninth Circuit in *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), the Court ruled that Garceau's federal habeas corpus petition was "pending" as of May 12, 1995, the day Garceau requested appointment of federal habeas counsel and a stay of execution. Since these events preceded the enactment of the AEDPA, the provisions of that statute, including 28 U.S.C. § 2254(d) and (e), were found not to apply. (Pet. App. 6.)[1/]

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1. The special capital case provisions of Chapter 154, which expressly apply even to cases pending at the time of the AEDPA's enactment, were not applicable to Garceau's case.

Freed of the provisions of the AEDPA, the Ninth Circuit applied a *de novo* standard of review, and looked to its own jurisprudence in analyzing Garceau's due process claim based on the instructional error. (Pet. App. 8-15.) The Ninth Circuit acknowledged that this Court has specifically declined to determine whether due process is violated by the admission of other-crimes evidence for the purpose of showing conduct in conformity therewith, or whether it violates due process to admit other-crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. (Pet. App. 10-11 (citing *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991).) However, applying Ninth Circuit authority as stated in *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993), the court found that the jury instruction in question violated due process. The Ninth Circuit also found that the error was prejudicial under the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

The State filed a petition for rehearing and rehearing en banc, which was denied on February 15, 2002. (Pet. App. 27-28.)

SUMMARY OF ARGUMENT

This case involves the issue of when a capital habeas corpus proceeding commences for purposes of determining the applicability of Chapter 153 of the AEDPA. In *Lindh v. Murphy*, 521 U.S. at 320, this Court held that Chapter 153 did not apply to non-capital cases pending prior to the AEDPA's April 24, 1996, effective date. *Lindh* did not address the event necessary to create a "pending" capital case.

Applying the plain meaning of "pending" to capital cases, a habeas corpus case begins with the filing of the application for habeas corpus relief. A review of the provisions

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Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000), as amended.

of Chapter 153, and the Rules Governing § 2254 Cases, shows a clear intention to have the provisions apply to "applications for writ of habeas corpus." Given these provisions, it is reasonable to conclude that the proper "trigger event" for determining the application of the AEDPA provisions is the filing of the application for writ of habeas corpus, rather than some earlier procedural event.

The Ninth Circuit erroneously relies on this Court's opinions in *McFarland v. Scott*, 512 U.S. 849 (1994) and *Hohn v. United States*, 524 U.S. 236 (1998) to find that a capital habeas case commences with the filing of requests for appointment of counsel and stay of execution. *Kelly*, 163 F.3d at 539-40. These cases do not support a deviation from the plain meaning of "pending" for purposes of determining whether Chapter 153 of the AEDPA applies to capital cases. Both of these cases confronted a specific issue, and did not address the issue of the correct application of Chapter 153. *McFarland* interprets the meaning of a "post-conviction proceeding" in order to give effect to the clear congressional intent behind 21 U.S.C. § 848(q)(4)(B), which provides for appointment of counsel in capital cases. *Hohn* stands only for the proposition that the denial by the district court of a motion for the issuance of a certificate of appealability ("COA"), or a motion for leave to file a petition for the writ, constitutes an appealable "case" for purposes of granting certiorari jurisdiction pursuant to 28 U.S.C. § 1254.

The Ninth Circuit's approach is also flawed because preliminary acts, such as requesting appointment of counsel and a stay of execution, should not be used to determine the application of the AEDPA's substantive provisions, which address the merits of filed habeas corpus petitions. Also, as this Court found in *Slack v. McDaniel*, 529 U.S. 473 (2000), there is no requirement that all proceedings having any relation to a habeas petition be viewed as a unified whole. Therefore, the earlier filing of preliminary motions need not determine the application of the AEDPA, if the application for habeas corpus relief was filed after the AEDPA's enactment.

Finally, there is no justification for using a different trigger event in capital cases than is used in noncapital cases. In the latter, the application of the AEDPA is determined by the filing of the habeas corpus petition. The substantive provisions of Chapter 153 are intended to apply to both types of cases. *See Lindh v. Murphy*, 521 U.S. at 326. Also, a rule which limits the number of capital cases to which the substantive provisions apply thwarts the AEDPA's general purpose to "enhance the States' capacities to control their own adjudications." *Id.* at 334, n.7.

Garceau's requests for appointment of counsel and stay of execution were filed before the April 24, 1996, effective date of the AEDPA. His petition for writ of habeas corpus on the merits was filed after that date. Garceau raised a due process violation arising from an instructional error which allowed the jury to consider other crimes evidence for the purpose of assessing his character and propensity to commit the current crimes. The California Supreme Court considered and denied the claim. Garceau's case should have been, but was not, subject to the deferential standard of review provided in 28 U.S.C. §§ 2254(d) and (e), and the state court's adjudication of his claim should have been upheld.

After determining that the provisions of the AEDPA did not apply to Garceau's case, the court was free to engage in *de novo* review of the state capital conviction, and apply its own jurisprudence. Although the Ninth Circuit acknowledged that this Court had declined to find a due process violation based on the admission of other crimes evidence in *Estelle v. McGuire*, 502 U.S. at 75 n.5, it found a due process violation based on its own Ninth Circuit precedent. It also imposed its own contrary assessment of the weight of the evidence to overcome the California Supreme Court's finding that even a constitutional error would have been harmless given the "overwhelming" evidence of guilt. The Ninth Circuit's determination that the AEDPA did not apply resulted in the reversal of Garceau's capital conviction.

This Court's determination that a capital case commences, for purposes of applying the AEDPA, with the filing of the petition for habeas corpus relief will resolve this important issue, correct the injustice resulting from the reversal of Garceau's conviction, and ensure the application of the AEDPA to other capital cases in the Ninth Circuit.

ARGUMENT

I.

THE APPLICATION OF THE AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL HABEAS PETITION WAS FILED

A. The Plain Meaning Of "Pending" Applies

In *Lindh v. Murphy*, 521 U.S. at 320, this Court considered whether the provisions of Chapter 153 (28 U.S.C. §§ 2241-2255) applied retroactively in habeas cases pending at the time of the AEDPA's effective date. Based on the absence of express statutory language of retroactivity in Chapter 153, it was determined that those provisions did not apply to pending habeas cases.[2/] *Lindh* did not address the issue of the "trigger event" necessary to create a pending federal habeas corpus case for purposes of determining the application of the AEDPA to capital cases. The plain meaning of "pending" should be applied, and the necessary event determined to be the filing of the application for federal habeas corpus relief.

In *Calderon v. United States District Court* (*Kelly*), 163 F.3d 530, the Ninth Circuit determined that the filing of requests for appointment of counsel and stay of execution before the April 24, 1996 effective date of the AEDPA creates a "pending" case not subject to the AEDPA's provisions, even

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2. This Court relied heavily on the fact that Chapter 154, which contains special provisions applying to capital cases, included an express statement of retroactivity to pending cases. See Chap. 154, § 107(c). Therefore, if Congress intended Chapter 153's provisions to be retroactive to pending cases, it would have made the same expression of intent. *See Lindh*, 521 U.S. at 327.

if the petition for writ of habeas corpus was filed after that date. This opinion is wrongly decided and contrary to the conclusion reached by the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits, all of which use the date the habeas corpus petition was filed to determine the AEDPA's application. *Isaacs v. Head*, 300 F.3d 1232, 1239, n.1 (11th Cir. 2002); *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999); *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1999).

Garceau filed his requests for counsel and stay of execution on May 12, 1995. The habeas corpus petition was filed on July 2, 1996. Applying *Kelly*, the Ninth Circuit found that Garceau's case was pending as of the filing of the requests for appointment of counsel and stay of execution. Since the case was "pending" at the time of the effective date of the AEDPA, its provisions were inapplicable. Garceau's state conviction was subject to *de novo* review, rather than the more deferential review provided in 28 U.S.C. § 2254(d) and (e). The failure to apply these provisions resulted in the granting of the habeas petition, and the improper reversal of Garceau's capital conviction.

The plain meaning of "pending" supports the conclusion that Chapter 153 applies to applications for habeas corpus filed on or after the AEDPA's effective date, and that this is unaffected by the earlier filing of other preliminary matters. A review of the provisions of Chapter 153 show a clear intention to have the provisions apply to "applications for writ of habeas corpus." See 28 U.S.C. §§ 2241(d), 2243-2250, 2255. Section 2254(e)(1) even refers to "a proceeding instituted by an application for a writ of habeas corpus." Section 2242 details the requirements for an "application for a writ of habeas corpus." It must be in writing, signed and verified by the petitioner, or someone acting in his behalf. It must allege the facts concerning the applicant's commitment or detention, the name of the person who has custody of petitioner and by virtue of what claim or authority. The petition is required to set forth

the grounds for relief, and provide, in summary form, the facts supporting each of the specified grounds. Rules Governing § 2254 Cases, Rule 2. Given these provisions, it is reasonable to conclude that the proper "trigger event" for determining the application of these provisions is the filing of the application for writ of habeas corpus. *See McFarland v. Scott*, 512 U.S. at 862, (O'Connor, J., concurring in part and dissenting in part) (The provisions of the pre-AEDPA habeas corpus statute, and the Rules Governing § 2254 Cases, indicate that a "pending" case is created by the filing of the habeas corpus application.).

There is no justification for deviating from the plain meaning of the word "pending." "In ordinary usage a case is pending when a complaint or petition is filed." *Williams v. Coyle*, 167 F.3d at 1038, citing *Black's Law Dictionary* 1134 (6th ed. 1990). This definition is applicable in habeas cases because Federal Rules of Civil Procedure, Rule 3, provides that "[a] civil action is commenced by the filing of a complaint with the court." The Federal Rules of Civil Procedure may be applied to habeas cases to the extent they are not inconsistent with the Rules Governing § 2254 Cases, and, as to this definition, there is no inconsistency. *Williams*, at 1038. *See also Isaacs v. Head*, 300 F.3d at 1243 (quoting *Williams*, 167 F.3d at 1038 and adopting its explanation of "pending"); *Williams v. Cain*, 125 F.3d at 274 (adopting the filing date of the petition as the "obvious approach" to defining "pending"); *Moore v. Gibson*, 195 F.3d at 1163 (applying ordinary meaning of "pending" and requiring the filing of "a petition seeking substantive relief"); *Gosier v. Welborn*, 175 F.3d at 506 (requiring the filing of "a collateral attack on a criminal judgment").

B. This Court's Decisions In *McFarland v. Scott* And *Hohn v. United States* Do Not Justify A Deviation From The Plain Meaning Of "Pending"

In *Kelly*, the Ninth Circuit adopted a broader

interpretation of "pending case" which includes the filing of the requests for appointment of counsel and stay of execution in capital cases. If these were filed before the AEDPA's effective date, Chapter 153 is not applied. The Ninth Circuit relied on this Court's opinions in *McFarland v. Scott*, 512 U.S. at 849, and *Hohn v. United States*, 524 U.S. at 236, to conclude that these preliminary matters are within the definition of "case."

In *McFarland*, this Court considered two statutory provisions related to habeas cases: 21 U.S.C. § 848(q)(4)(B), which creates a statutory right to qualified legal representation for capital defendants in federal habeas proceedings, and 28 U.S.C. § 2251, which grants a federal judge before whom a habeas proceeding is pending the power to stay any related state court proceeding. The lower courts in *McFarland* had refused to appoint habeas counsel for the defendant pursuant to § 848(q)(4)(B) because the defendant had not yet filed a habeas petition. *Id.* at 851-54.

This Court noted that § 848(q)(4)(B) "grants indigent capital defendants a mandatory right to qualified counsel and related services '[i]n any [federal] post conviction proceeding,'" but the statute does not "define a 'post conviction proceeding' under § 2254 or § 2255 or expressly state how such a proceeding shall be commenced." *Id.* at 854-55 (quoting § 848(q)(4)(B)) (brackets in original). Since the "interpretation [of the statute to permit the appointment of counsel prior to the filing of a formal petition] is the only one that gives meaning to the statute as a practical matter," this Court concluded that a "post conviction proceeding" within the meaning of § 848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting the appointment of counsel for his federal habeas corpus proceeding. *Id.* at 855-57.

After reaching that conclusion, this Court went on to address the similar issue of whether a federal court has authority to stay state court proceedings pursuant to 28 U.S.C. § 2251 prior to the filing of a formal habeas petition. Section 2251 grants any federal judge "before whom a habeas corpus proceeding is pending" power to enjoin related state court

proceedings. 28 U.S.C. § 2251. This Court held that the provisions of §§ 848(q)(4)(B) and 2251 must be similarly interpreted to ensure that once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution in order to permit the preparation of the habeas petition. *McFarland*, 512 U.S. at 857-58.

McFarland's holding rests on the necessity of expanding the ordinary meaning of a "pending case" in order to give effect to congressional intent to provide defendants with legal assistance, and to provide sufficient time to prepare habeas petitions. *Williams v. Coyle*, 167 F.3d at 1039. It was intended to "resolve practical procedural problems." *Williams v. Cain*, 125 F.3d at 274. *McFarland* did not "answer the question of what date a habeas petition becomes 'pending' for determining the applicability of substantive statutes." *Id.* It does not support a deviation from the presumption that a habeas corpus case commences with the filing of the application for habeas corpus.

Furthermore, a request for counsel under 21 U.S.C. § 848(q)(4)(B) may be filed at any time by a federal or state defendant, and it applies, not just to habeas corpus proceedings, but to any available post-conviction procedure, including clemency and competency proceedings (§ 848(q)(8)). Given the broad scope of § 848 proceedings, it is not likely that Congress intended to exempt any "case" from the substantive provisions of the AEDPA merely because the request for counsel was initiated prior to the enactment of the AEDPA.

In *Hohn v. United States*, 524 U.S. at 236, this Court addressed whether a court of appeals' denial of a COA application constituted a "case" such that this Court had certiorari jurisdiction pursuant to 28 U.S.C. § 1254 to review the denial. *Id.* at 241. This Court examined the process utilized by the court of appeals in addressing Hohn's application for the COA, as well as the adversary nature of the proceeding. It was determined that "[t]he dispute over Hohn's entitlement to a

certificate falls within [the] definition" of a case for the purposes of § 1254. *Id.*

Hohn's holding relied on *Ex Parte Quirin*, 317 U.S. 1 (1942), which confronted the "analogous question" of whether a request for leave to file a petition for a writ of habeas corpus constituted a "case" in a district court. This Court found that the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request. Since a suit is instituted by the presentation of the petition for judicial action, the denial of leave to file the petition is a judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals. *Hohn*, 524 U.S. at 246, interpreting *Ex Parte Quirin*, 317 U.S. at 24.

Hohn defines "case" in a significantly different context from a determination of whether the AEDPA's provisions apply to capital cases. As stated by Judge Cynthia Holcomb Hall, in her dissent in *Kelly*, "[T]he words may appear the same, but their meanings are vastly different." *Kelly*, 163 F.3d at 544.[3/] Unlike a request for a certificate of appealability, which goes to the merits of a habeas case, requests for appointment of counsel and stay of execution do not constitute a post-conviction proceeding seeking relief from injury. They do not involve a collateral attack on a criminal judgment so as to constitute a case under Chapter 153 of Title 28. *Gosier v. Welborn*, 175 F.3d 504; *see also Williams v. Coyle*, 167 F.3d 1036, quoting *Holman v. Gilmore*, 126 F.3d 876, 880 (7th Cir. 1997) ("[T]he motion for counsel is not itself a petition, because it does not call for (or even permit) a decision on the merits.

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3. Given the fact that *Hohn* was issued in 1998, after the enactment of the AEDPA, the reasoning of that case could not have been considered by Congress when it enacted the AEDPA. *Kelly* acknowledged that, until the publication of *Hohn*, *McFarland v. Scott*, 512 U.S. 849, published in 1994, did not support a determination that a "case" began with the filing of a request for counsel. *Kelly*, 163 F.3d at 539.

And it is 'the merits' that the amended § 2254(d)(1) is all about."). As the Eleventh Circuit stated in *Isaacs v. Head*, 300 F.3d at 1245:

> We agree that, in a sense, the filing of a motion for appointment of counsel or other threshold motions might initiate some form of "case," at least in the constitutional sense. However, such a motion does not necessarily mark the genesis of the habeas case under § 2254. A motion for appointment of counsel has no relation to the merits of a habeas petition and does not seek any form of merits relief from a district court. Such a motion does not even assure that a habeas case will ever materialize. For example, an appointed counsel could well conclude that the would-be petitioner has no colorable claims to present. Therefore, only when an actual habeas petition is filed seeking relief from a conviction or sentence does § 2254 come into play.

There is also no requirement that all proceedings having any relation to a habeas petition must be viewed as a unified whole. *Slack v. McDaniel*, 529 U.S. 473. *Slack* expressly recognized that a court, in order to determine the applicable provisions of the AEDPA, must determine what is "the relevant case." *Id.* at 482. In *Slack*, this Court looked to the filing date of the notice of appeal, rather than the filing date of the application for habeas relief, to determined whether the the post-AEDPA provisions of 28 U.S.C. § 2253 applied. *Id.* The Eleventh Circuit, in *Isaacs v. Head*, 300 F.3d at 1245-46, relied on this reasoning in rejecting the *Kelly* rule:

> We believe that it follows--from the Supreme Court's recognition that an appellate case may be subject to AEDPA even though the underlying district court proceedings were not--that even though a motion for appointment of counsel was filed before AEDPA and

> was not subject to its provisions, a later-filed habeas petition may nonetheless be governed by the stricter AEDPA standards that took effect in the interim. The simple fact is, at the time AEDPA became the law, Isaacs' habeas case was not pending because it had not yet been filed and he had not asked the district court for any type of merits relief that could be characterized as habeas relief. . . .

Lastly, the provisions of Chapter 153 should be equally applied to both capital and non-capital cases. *See Lindh v. Murphy*, 521 U.S. at 326 (the provisions of Chapter 153 apply to all habeas corpus cases). A non-capital applicant must have filed an actual petition for habeas relief prior to April 24, 1996, in order for those provision to be inapplicable. There is no § 848 pre-application procedure in non-capital cases, and there is nothing about a § 848 proceeding that implicates the substantive changes in Chapter 153. In addition, an interpretation which results in a smaller number of capital cases being subject to the AEDPA provisions thwarts "the Act's general purpose to enhance the States' capacities to control their own adjudications." *Id.* at 334.

II.

THE NINTH CIRCUIT'S FAILURE TO APPLY THE DEFERENTIAL REVIEW PROVIDED IN 28 U.S.C. § 2254 RESULTED IN THE IMPROPER REVERSAL OF GARCEAU'S CAPITAL CONVICTION

Applying an erroneous trigger event, the Ninth Circuit determined that Garceau's habeas corpus case was pending prior to the enactment of the AEDPA and not subject to its provisions. As a result, the court applied *de novo*, rather than deferential review, and Ninth Circuit jurisprudence, to reverse Garceau's capital conviction. This Court granted certiorari to resolve the issue of the correct trigger event for determining the application of the AEDPA in capital cases. The State asks this Court to also resolve this capital case on the merits, as the merits determination appears to be fairly included or comprised within the stated question. Supreme Court Rule 14.1(a). The State challenged the erroneous trigger event, and the resulting reversal, in the petition for rehearing filed in the Ninth Circuit.

The provisions of the AEDPA – specifically those contained in 28 U.S.C. § 2254(d) and (e) – provide for deferential review of state criminal convictions. *See Lindh v. Murphy*, 521 U.S. at 334 n.7 (28 U.S.C. § 2254(d) creates a "new highly deferential standard for evaluating state court rulings"); *Woodford v. Visciotti*, 537 U.S. ___, 2002 WL 31444314 (Nov. 4, 2002), per curium (state court decisions must be given "the benefit of the doubt"). These provisions prohibit a grant of habeas relief if a claim was adjudicated on the merits in state court, unless the adjudication of the claim was contrary to, or involved an unreasonable application of, this Court's clearly established precedent (28 U.S.C. § 2254(d)(1)), or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding (28 U.S.C. § 2254(d)(2).) Section 2254(e)(1) grants a presumption of correctness to state court

factual determinations. The Ninth Circuit's determination that the provisions of the AEDPA did not apply to Garceau's case allowed it to engage in *de novo*, rather than deferential, review. Moreover, application of the *Kelly* rule permitted the Ninth Circuit to extend and apply its own jurisprudence, rather than clearly established United States Supreme Court precedent. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (United States Supreme Court precedent is applied).

In both state and federal court, Garceau claimed his due process rights were violated by a jury instruction allowing other crimes evidence to be considered for the purpose of determining his character and his conduct on a specific occasion. The jury, in addition to hearing evidence pertaining to the victims' deaths, received evidence pertaining to Garceau's illegal drug activity and the murder of Greg Rambo. Garceau objected only to the instruction, and not to the admission of the evidence. (Pet. App. 138-42, and n.17 [jury instruction given].) The California Supreme Court found that California law does not permit other crimes evidence, and found that there was a possibility that the erroneous instruction impaired Garceau's constitutional right to due process by lightening the prosecution's burden. Without deciding the issue, the Court assumed a constitutional violation existed and found the error harmless under the test of *Chapman v. California*, 386 U.S. 18, 24 (1967) (harmless beyond a reasonable doubt). (Pet. App. 141.)

The California Supreme Court's finding of harmless error was discussed in detail in its published decision. Prior to trial, the defense advised the court that it would not object to the prosecutor introducing facts of the Rambo murder in the prosecution's case-in-chief because the defense intended to use the Rambo killing to reinforce the defense being offered. The defense was that one or more of Garceau's acquaintances, and fellow participants in a drug operation, had a motive to commit both the Bautista and Rambo murders. Based on the defense's statement that the defense would not object to the admission of the Rambo murder evidence, the prosecutor requested, and the

court gave, over defense objection, the erroneous special instruction advising the jury that it could consider the other crimes evidence for numerous purposes, including Garceau's "character or any trait of his character." (Pet. App. 138-39.)

The California Supreme Court found that the probative value of the other crimes evidence was diluted because the defense desired the jury to consider the evidence for the purpose of establishing Garceau's innocence. Weighed against the "overwhelming evidence establishing defendant's guilt of the charged offenses," the Court found the special instruction led to cumulative, rather than unduly prejudicial, use of the evidence. (Pet. App. 142.) The evidence against Garceau included "defendant's damning trail of incriminating statements, and circumstantial evidence linking him to the Bautista murders." *Id.* The circumstantial evidence was testimony placing Garceau at the crime scene, showing Garceau and Maureen Bautista had been arguing, establishing Garceau's fear that Maureen would "snitch him off," and corroborating Garceau's reports of the brutality of the attack, the extreme lengths Garceau went to in disposing of the bodies, and his actions to hide his involvement. (Pet. App. 142; see also Pet. App. 103-17, entitled "Facts.") Based on the totality of the evidence, the California Supreme Court found the instructional error to be harmless beyond a reasonable doubt.

In separate concurring opinions, two California Supreme Court Justices, Mosk and Kennard, also found harmless error. Justice Mosk found that, assuming a due process error occurred, it would be harmless under the *Chapman* standard. He found that, although in the general case a propensity instruction would pose a grave danger of prejudice, Garceau's case was "*not* the general case." (Pet. App. 173, emphasis in the original.) The multiple confessions, which were corroborated by both physical and testimonial evidence, "must practically compel the jury to return a guilty verdict no matter what the other evidence says or does not say." (Pet. App. 173.) Hence, the other crimes instruction proved to be

"unimportant in relation to everything else the jury considered on the issue in question." (Pet. App. 174.)

Justice Kennard found the issue of whether there was a due process violation to be presently "unclear" and noted the fact that this Court declined to address the issue in *Estelle v. McGuire*, 502 U.S. 62. (Pet. App. 176.) She also concluded that the error in question did not lighten the prosecution's burden of proof in a manner constituting a federal constitutional violation. (Pet. App. 177.) Applying the state harmless error standard of *People v. Watson*, 466 Cal.2d 818, 836 (1956) (reasonable probability that a result more favorable to the defendant would have been reached in the absence of the error), Justice Kennard found harmless error. Reviewing the evidence, she found that the jury was essentially confronted with a credibility contest. The witnesses to the "other crime" murder of Rambo were the same witnesses used in the current case. The defense did not oppose admission of the Rambo murder evidence because it viewed that evidence as less credible than the evidence of the charged murders. The defense was counting on the jury to disbelieve the prosecution's witnesses as to the Rambo murder, and thereby undermine their credibility as to the charged murders. Given this credibility contest, "it is highly unlikely that the jury in reaching its guilt verdicts relied to any significant degree on inferences about defendant's character drawn from the Rambo murder." (Pet. App. 178.)

The Ninth Circuit examined *Spencer v. Texas*, 385 U.S. 554 (1967) (no due process violation to admit other crimes evidence for purposes other than propensity, where the jury was given a limiting instruction not to consider the prior conviction as evidence of guilt in the current case), and *Estelle v. McGuire*, 502 U.S. 62, *accord*. The Ninth Circuit acknowledged that this Court, in *Estelle v. McGuire*, specifically declined to determine whether due process is violated by the admission of other crimes evidence for the purpose of showing conduct in conformity therewith, or whether due process is violated by the admission of other crimes evidence for other purposes without an instruction

limiting the jury's consideration of the evidence to such purposes. (Pet. App. 10-11 (citing *Estelle v. McGuire*, 502 U.S. at 75 n.5).)

The California Supreme Court's determination in *Garceau*, which assumed without deciding that a due process violation occurred, was not contrary to, nor did it involve an unreasonable application of *Spencer v. Texas*, 385 U.S. 554, or *Estelle v. McGuire*, 502 U.S. 62, because a finding of a due process violation was not mandated by these cases. 28 U.S.C. § 2254(d)(1). Furthermore, the Court's determination that the assumed error was harmless under even the most stringent *Chapman* standard ("harmless beyond a reasonable doubt"), was not contrary to, nor did it involve an unreasonable application of, this Court's less onerous test for harmless error on habeas review, as stated in *Brecht v. Abrahamson*, 507 U.S. at 637 ("substantial and injurious effect or influence" in determining the jury's verdict). The California Supreme Court found the evidence included "overwhelming evidence establishing defendant's guilt of the charged offenses." The California Supreme Court found the erroneous instruction led to cumulative, rather than unduly prejudicial, use of the evidence. (Pet. App. 142.) (See also the concurring opinions of Justices Mosk and Kennard, Pet. App. 172-78.) The court also found the evidence against Garceau included "defendant's damning trail of incriminating statements, and circumstantial evidence linking him to the Bautista murders." (Pet. App. 142.)

The Ninth Circuit concluded it was free of the requirements of deferential review, and engaged in *de novo* review. After acknowledging the lack of Supreme Court precedent dictating a finding of a due process violation, the Ninth Circuit looked to its own authority and concluded that the other crimes instruction given in this case violated due process. The Ninth Circuit also found the error was prejudicial under the standard in *Brecht v. Abrahamson*, 507 U.S. at 637. The court simply substituted its interpretation of the law and the facts for that of the California Supreme Court, and overturned the state capital conviction.

CONCLUSION

This judgment of the court of appeals should be reversed.

Dated: November 8, 2002.

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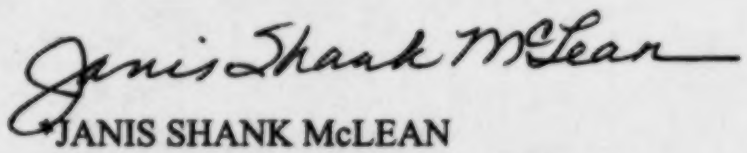

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FOR ARGUMENT

Supreme Court, U.S.
FILED
DEC 20 2002
CLERK

No. 01-1862 (9)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

JEANNE WOODFORD, Petitioner,

v.

ROBERT FREDERICK GARCEAU, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In 1994, this Court held in *McFarland v. Scott*, 512 U.S. 849, that a capital habeas corpus proceeding is "pending" in federal court, for purposes of the stay provisions of 28 U.S.C. § 2251, after the filing of a motion for appointment of counsel and before the filing of a formal habeas petition or application. In 1996, Congress specifically used the phrase "case pending" in the key retroactivity provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), rather than "petition" or "application," which were predominantly used in other parts of the statute. When a habeas petitioner under sentence of death initiated federal proceedings by filing a motion for the appointment of counsel and for a stay of execution, and filed a pleading required by local district court rules which identified exhausted colorable federal claims to justify a further stay of execution, all prior to the enactment of AEDPA, did he have a "case pending" so that Chapter 153 of AEDPA does not apply?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

No. 01-1862

JEANNE WOODFORD, Petitioner,

v.

ROBERT FREDERICK GARCEAU, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Garceau was convicted of two murders in Kern County, California, and was sentenced to death. On direct appeal, the California Supreme Court affirmed his conviction and sentence. Pet. App. 102-179 (*People v. Garceau*, 6 Cal.4th 140, 24 Cal.Rptr.2d 664, 862 P.2d 664 (1993)). The Court held, *inter alia*, that any due process violation based on an erroneous instruction which told the jury that it could consider evidence of defendant's other crimes for "any purpose," including his criminal propensity, was harmless. Pet. App. 141-142. This Court denied certiorari review on October 3, 1994. *Garceau v. California*, 513 U.S. 848 (1994).

On May 12, 1995, Garceau filed a request for appointment of counsel and for a stay of execution in U.S. District Court, Eastern District of California. Resp. App. 203-210. The district

court issued a 45-day stay of execution on the same day. Resp. App. 199-202. Counsel was appointed on June 26, 1995, and the district court extended the stay of execution for 120 days.[1] Resp. App. 211-214. On August 1, 1995, the State filed a noticed motion to vacate the stay of execution, which contended that: 1) the stay was not justified because appointed counsel were not new to the case and 2) the stay application provided only a conclusory statement that counsel believed there were meritorious federal constitutional claims rather than a specification of nonfrivolous issues as required by local rules. Resp. App. 215-224. On August 14, 1995, Garceau filed an opposition to the motion to vacate, as well as a pleading entitled "Specification of Nonfrivolous Issues," which identified exhausted colorable federal constitutional claims. Resp. App. 225-233. On October 13, 1995, after a hearing, the district court denied the State's motion to vacate the stay of execution. The court also ordered that the petition be filed within nine months. Resp. App. 239-241. Garceau filed his initial funds request on November 17, 1995, and a case budget on November 27, 1995. Resp. App. 242-244. As ordered by the district court, on July 2, 1996, Garceau filed his federal habeas petition which consisted of twenty-four fully exhausted claims, and two other claims as to which the failure to exhaust was excused. Pet. App. 31; Joint App. 4.

On July 30, 1999, the district court issued an order denying the habeas corpus petition. Pet. App. 30-101. The Court of Appeals reversed, finding that the due process violation stemming from the propensity instruction was prejudicial under *Brecht v. Abrahamson*, 507 U.S.

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[1] In its Order Appointing Counsel and Temporary Stay of Execution, the district court referred to Garceau's request for counsel and stay of execution as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and referred to the subsequent petition which would be filed on the merits as an amended petition. Resp. App. 211-212.

619 (1993). The case was reversed and remanded to the district court with instructions to issue the writ of habeas corpus. Pet. App. 1-26 (*Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001)).

The case was not litigated under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Amended Chapter 153 of AEDPA does not apply to cases that were pending when AEDPA was enacted on April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Garceau's case was a "case pending" because his case "had been filed" before the "date of the Act" when he filed a motion for the appointment of counsel and for a stay of execution in May 1995. *Id.* at 327; *see Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 539 (9th Cir. 1998)(en banc), *cert. denied*, 526 U.S. 1060 (1999); *Garceau v. Woodford*, 275 F.3d at 772, n. 1.

SUMMARY OF ARGUMENT

AEDPA amended the habeas corpus provisions of Chapter 153 of Title 28 of the U.S. Code, and added a new set of provisions to expedite capital habeas corpus proceedings – Chapter 154. Section 107(c) of AEDPA expressly provides that Chapter 154 can be applied retroactively to all capital habeas corpus cases – to "cases pending on or after the date of enactment." Chapter 154 only applies, however, in jurisdictions which have met certain statutory requirements. California is not one of them. *Ashmus v. Woodford*, 202 F.3d 1160, 1165 (amended opinion), *cert. denied*, 531 U.S. 916 (2000). Amended Chapter 153 (hereinafter "Chapter 153" for ease of reference), on the other hand, is not retroactive. As this Court held, the "negative implication of section 107(c)" is that Chapter 153 does not apply to "cases pending" prior to the date AEDPA became effective. *Lindh v. Murphy*, 521 U.S. 320, 327, 336 (1997).

The issue before this Court is whether Chapter 153 applies to the finite group of habeas

petitioners, such as Garceau, who initiated habeas corpus proceedings in federal court prior to AEDPA's effective date but subsequently filed a formal petition. The State contends that based on the "plain meaning" of the term "pending" in § 107(c), a formal habeas petition must have been filed for a case not to be subject to Chapter 153's provisions. This analysis is flawed because it fails to take into account either the language of the statute as a whole or the legal backdrop against which Congress enacted the provision in question. An examination of both clearly demonstrates Congress's intent.

Congress often used the term "petition" or its synonym "application" throughout AEDPA, but it did not use these terms in section 107(c), opting for the broader phrase "case pending." Accordingly, Chapter 154, when applicable, is retroactive to all "cases pending" in federal court, not only to those cases in which a petition has been filed. Had Congress intended for "cases pending" to mean something different in the context of Chapter 153 – namely, only federal proceedings in which a formal petition had been filed prior to AEDPA's enactment – it would have been more explicit.

Moreover, when viewed in the context of this Court's then-recent decision in *McFarland v. Scott*, 512 U.S. 849 (1994), it becomes clear that Congress deliberately chose a term that would encompass a wider range of proceedings than the filing of a formal petition. In *McFarland*, this Court reversed the Fifth Circuit's holding that the filing of a habeas corpus petition was required to commence federal proceedings in a capital case in order to entitle the petitioner to habeas counsel under 21 U.S.C. § 848(q)(4)(B) and a stay of execution under 28 U.S.C. § 2251. This Court held that a "'post-conviction proceeding' ... is commenced by the filing of a death row defendant's motion requesting the appointment of counsel." *Id.* at 856-857.

Congress is presumed to be and certainly was aware that *McFarland* construed the above-cited statutes not to require the filing of a petition for a case to be considered pending. Given this awareness, had Congress intended that a formal petition be the critical pleading that commenced proceedings and created the dividing line for retroactive application of Chapter 153, it would have used the term "petition" or "application" rather than the phrase "case pending" in section 107(c).

That a petition is not a necessary prerequisite for a habeas proceeding to constitute a pending "case" is confirmed by *Hohn v. United States*, 524 U.S. 236 (1998). In *Hohn*, this Court held that an application for a certificate of appealability ("COA") constituted a "case" sufficient to give this Court jurisdiction to review the appellate court's denial of the COA under 28 U.S.C. § 1254. *Hohn* rejected the facile distinction urged here by the State between preliminary filings and challenges to the merits in determining the meaning of the term "case." Rather, as this Court emphasized, the proper analysis in determining whether a proceeding constituted a case is to look at whether there is adversity and other requisite qualities of a "case," including whether it requires a ruling that is judicial in nature. *Id.* at 241, 245, 249.

Garceau's federal habeas proceedings which pre-dated AEDPA had these attributes of a case, as well as those that the State contends can only be satisfied through the filing of a formal petition, such as notice of claims and providing the court with the opportunity to dispose of frivolous petitions. Garceau initiated federal proceedings by filing a motion for the appointment of counsel and a stay of execution, which were granted. The State moved to vacate an extension of the stay which had been granted to permit counsel time to prepare a habeas petition. The State's motion argued, *inter alia*, that Garceau had failed to justify the stay as required by local

rules by identifying nonfrivolous claims that would be presented in a federal petition. Garceau subsequently filed a Specification of Nonfrivolous Issues, which identified exhausted, colorable federal constitutional claims. The district court denied the State's motion to vacate the stay, implicitly finding the presence of nonfrivolous claims of federal constitutional error.

Clearly, the State had ample notice of Garceau's federal claims not only by virtue of the specification of issues, but due to the rules of exhaustion and procedural default, which required that Garceau's claims had to have been raised previously in state court post-conviction proceedings. There was also the potential for adversity as exemplified by the contested proceedings. Moreover, under the local rules, the district court was required to determine before extending the pre-petition stay that Garceau had at least one nonfrivolous federal claim – a ruling that was unquestionably judicial in nature and which could have disposed of the case if the stay were denied. In light of the nature and extent of these pre-petition proceedings, the State's contention that Garceau did not have a case pending prior to the enactment of AEDPA cannot be reconciled with Congressional intent as discerned from the language of AEDPA, the legal context in which it was enacted, and this Court's subsequent precedent.

Finally, while the State's petition for writ of certiorari was limited to the question discussed above regarding the applicability of Chapter 153 of AEPDA, it attempts in its Brief on the Merits to obtain from this Court a determination of Garceau's due process claim upon which the court below granted relief under a pre-AEDPA standard of review. This question is factually and legally distinct from the question upon which review was granted, and the State's belated attempt to insert it violates this Court's Rule 14.1(a).

ARGUMENT

I.

THE LANGUAGE OF AEDPA AND THE LEGAL CONTEXT IN WHICH IT WAS ENACTED DEMONSTRATE THAT THE "CASES PENDING" LANGUAGE GOVERNING RETROACTIVITY WAS NOT INTENDED TO REFER SOLELY TO HABEAS "PETITIONS" OR "APPLICATIONS" BUT WAS MEANT TO ENCOMPASS FILINGS RECOGNIZED AS INITIATING FEDERAL HABEAS PROCEEDINGS

A. The State Relies On An Interpretation of the Term "Pending" Based on "Plain Language" That Has No Relevance to the Intent of Congress

AEDPA made essentially two sets of changes to federal habeas corpus proceedings. First, it amended several provisions of the pre-existing habeas corpus statutes, i.e., those in Chapter 153 of Title 28 of the United States Code. Second, it added an entirely new chapter to Title 28 – Chapter 154 – containing new expedited provisions that apply only to capital habeas cases arising out of states that have satisfied certain pre-conditions.[2]

In *Lindh v. Murphy*, 521 U.S. 320, this Court determined that the provisions of Chapter 153 did not apply to "cases pending" at the time of AEDPA's enactment. *Id.* at 323. The analysis in *Lindh* focused on the intent of Congress as revealed through the statutory language. *Id.* at 326. As this Court explained, § 107(c) of AEDPA expressly applied Chapter 154 to "cases pending on or after the date of enactment" while there was no such provision for Chapter 153 cases. *Id.* at 327. The Court read "this provision of § 107(c) ... as indicating implicitly that the amendments to Chapter 153 were assumed and meant to apply to the general run of habeas cases

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[2] California's death penalty scheme does not comply with the requirements of Chapter 154 and, therefore, the state cannot avail itself of the procedural advantages of that Chapter. *Ashmus v. Woodford*, 202 F.3d at 1165. As the State concedes, the only issue before this Court is whether or not the provisions of Chapter 153 apply to Garceau's case. *Woodford v. Garceau*, 123 S. Ct. 32 (2002); Pet. Brief, at 4-5, n.1.

only when those cases had been filed after the date of the Act." *Id.* Thus, the Court concluded. "the negative implication of § 107(c) is that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.* at 336.

The question now before the Court is what Congress meant by the term "case pending." As in *Lindh*, Congress's intent must be discerned from the language of the statute itself, as well as from the legal context in which the statute was enacted. *See McFarland v. Scott*, 512 U.S. at 854-856 (Court construed the meaning of "post conviction proceeding" in 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251 in light of the statute's related provisions and the "legal backdrop" against which Congress enacted the provisions in question); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)("we assume that Congress is aware of existing law when it passes legislation"); *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991) ("We certainly presume that . . . when Congress selected this language, our elected representatives were familiar with our recently announced opinions"); *and see Traynor v. Turnage*, 485 U.S. 535, 546 (1988), and authorities cited.

According to the State, a habeas corpus petition which fully complies with the pleading requirements of 28 U.S.C. § 2242 and Rule 2 of the Rules Governing § 2254 Cases must have been filed prior to AEDPA's enactment in order for a case to be pending (and thus not subject to AEDPA's Chapter 153 provisions). The State derives this interpretation from what it refers to as the "plain meaning" of the term "pending" in § 107(c), which it contends necessarily means a "petition" or "application" pending. Pet. Brief, at 10-11. However, Congress did not use the term "petition pending" or "petition filed" in § 107(c) even though it used the term "petition" or

the synonymous term "application" throughout AEDPA.[3] The State fails to explain why, if Congress intended that Chapter 153 of AEDPA apply to habeas cases unless there was a "petition filed" it did not simply use the term "petitions filed" or "applications filed" rather than the broader term "case pending."[4]

Section 107(c) expressly makes Chapter 154 applicable, where the state has met the statutory requirements, to all capital "cases pending on or after the date of enactment." *Lindh v. Murphy*, 521 U.S. at 327. The State certainly would not argue that the ordinary meaning of "case pending" in this context is "petition filed," rather than any capital habeas proceeding in federal court that was still pending – whether or not a petition had been filed. For example, a habeas petitioner in a Chapter 154 jurisdiction obviously would have a "case pending" and therefore be subject to Chapter 154's expedited procedures for filing a habeas petition, *see* 28 U.S.C. § 2263(a)(a habeas petition be filed within 180 days after the case becomes final on direct

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[3] In AEDPA, Congress normally used the word "application" to refer to a habeas corpus "petition." *See, e.g.*, 28 U.S.C. §§ 2244(b) & (d) [16 occurrences of "application"], 2254 [4 occurrences], 2262(b) & (c) [2 occurrences], 2263 [3 occurrences], 2266 [17 occurrences], Rule 22 [5 occurrences]. Congress referred to a habeas corpus "petition" three times. *See, e.g.*, 28 U.S.C. §§ 2262(b)(3), 2263(b)(2), 2264(a).

[4] References in AEDPA to a federal habeas corpus "case" occur less than one-third as often as "application" and "petition" and plainly were intended to encompass more than these two terms connote. That the terms "cases" and "applications" or "petitions" are not synonymous is confirmed by the fact that they have obviously different meanings in the four places in AEDPA where they are directly juxtaposed. *See* 28 U.S.C. section 2262(c) (limiting a habeas court's "authority to enter a stay of execution in the *case* unless the court of appeals approves the filing of a second or successive *application*" (emphasis added)); section 2266(b)(1)(A) (setting a time limit for a district court (in a proceeding governed by Chapter 154) to decide "any *application* for a writ of habeas corpus brought under this chapter in a capital *case*"); 2266(c)(1)(A) (an "application" brought in a capital "case"); and 2263(b)(3)(A) (authorizing the Chapter 154 statute of limitations to be tolled when permitted by the district court that would have jurisdiction over the "case" upon the filing of a habeas corpus "application").

appeal) prior to filing the petition. Thus, while Chapter 154, when applicable, includes cases where petitions were in fact filed "on or after the date of enactment," it presumably also encompasses federal habeas proceedings initiated prior to AEDPA's enactment in which a petition had yet to be filed (as well as cases in which the petition was filed before AEDPA's enactment).

As noted above, this Court found in *Lindh*, that the negative implication of § 107(c) is that habeas cases that were pending when AEDPA was enacted are not subject to Chapter 153. *Lindh v. Murphy*, 521 U.S. at 336. It is apparent that if "case pending" for purposes of Chapter 154 does not refer only to cases where there have been petitions filed, then the exact same provision in the context of Chapter 153 would not refer only to cases where there have been petitions filed. In other words, since a petitioner who initiates federal proceedings but has not filed a petition in a Chapter 154 jurisdiction has a "case pending," such a petitioner under Chapter 153 also has a case pending. As *Lindh* holds, Chapter 154 would be retroactive in such a circumstance but Chapter 153 would not be.[5] *Id.* at 327.

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[5] In examining the "ordinary meaning" of the word "pending" in other aspects of AEDPA, it is clear that it does not simply refer to "petition" pending. As discussed below, under the stay provision of 28 U.S.C. § 2251, which was left intact by Congress when it amended Chapter 153, a "proceeding ... pending" does not require a petition to be filed. *McFarland v. Scott*, 512 U.S. at 856-857. This Court also rejected the notion that "pending" referred to the period of time that the petition itself, albeit a petition for state collateral review, was under court consideration. *Carey v. Saffold*, __ U.S. __, 122 S. Ct. 2134, 2138 (2002). In that case, it was determined that under 28 U.S.C. § 2244(d)(2), which tolls the one year statute of limitations during the time an application for state collateral review is pending, the statutory term "pending" included intervals between the lower court determinations of a state petition and the filing of another petition in a higher court. *Id.* at 2140. Thus, "pending," even as in section 2244(d)(2), which explicitly refers to an "application" pending rather than to a "case" pending, does not require that a petition or application be filed. In addition, we know from this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), that an application of a certificate of appealability pursuant to 28 U.S.C. § 2253(c) can also constitute a "pending" case for purposes of applying AEDPA.

It becomes even more clear that the use of the phrase "case pending" in § 107(c) rather than "petition" or "application" must have been deliberate and meaningful on Congress's part when AEDPA is viewed in the context of this Court's 1994 decision in *McFarland v. Scott*, 512 U.S. 849. In *McFarland*, this Court considered a closely related question regarding when a habeas corpus case could be deemed pending under two statutory provisions: 21 U.S.C. § 848(q)(4)(B), which creates the right to counsel for capital defendants in federal habeas corpus proceedings, and 28 U.S.C. § 2251, which gives a federal judge before whom a "habeas corpus proceeding is pending" the power to grant a stay of execution. The lower court held that because no habeas petition had been filed, no "post conviction proceedings" had been initiated, and therefore McFarland was not entitled to the appointment of counsel and the court lacked jurisdiction to enter a stay of execution. *Id.* at 853.

This Court rejected this interpretation of a pending habeas proceeding, concluding that a "'post-conviction proceeding' ... is commenced by the filing of a death row defendant's motion requesting the appointment of counsel," thus entitling a petitioner to counsel prior to the filing of a habeas petition. *Id.* at 856-857. In addition, once a request for counsel has been filed in a capital habeas case, this Court held, the case is "pending" despite the absence of a formal habeas petition, thus permitting a stay of execution under 28 U.S.C. § 2251. *Id.* at 856-857.

Congress is presumed to have been thoroughly aware of this Court's holding in *McFarland* that a federal habeas corpus proceeding in capital cases is commenced not by the filing of a "petition" but by the filing of a motion for the appointment of counsel. *See, e.g.*,

McCarthy v. Bronson, 500 U.S. at 140-142.[6] Indeed, during the debate of a version of AEDPA which was passed in the Senate but not the House, in which a proposed amendment to 21 U.S.C. § 848(q)(4)(B) was rejected, the *McFarland* case was specifically cited. *See* 141 Cong.Rec. S7813 (June 7, 1995).[7]

Given *McFarland's* refusal to read the word "petition" or "application" into habeas statutes where these words did not appear, Congress would not have failed to use the word "petitions" or "applications" in section 107(c) of AEDPA if it had intended to limit section 107(c) to situations where a petition or application had been filed. And the failure to use "petition" or "application" in section 107(c) cannot be deemed to be an oversight or inadvertence, when those were the words used predominantly throughout the rest of AEDPA's habeas provisions.

The State cites to court of appeals cases which decline to find that the *McFarland* decision has any relevance to discerning the meaning of "case pending" in AEDPA. These cases

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[6] The *McFarland* decision was handed down June 30, 1994. Section 107(c) of AEDPA was first proposed in Congress on May 25, 1995. *See Lindh v. Murphy*, 521 U.S. at 330, n. 6.

[7] As initially proposed, AEDPA's habeas provisions would have amended § 848(q)(4)(B) by making the appointment of counsel discretionary rather than mandatory in capital habeas cases. *See* S. 735, 104th Cong., 1st Sess., § 608, 141 Cong.Rec. S7567 (May 25, 1995). Another provision in the Act proposed to make appointment of counsel discretionary in all habeas cases "[n]otwithstanding any other provision of law." *Id.*, §604(5), at S7565. However, when the import of the proposed amendment to § 848(q) was pointed out to the Act's authors during floor debates, the amendment was withdrawn, and the language making appointment of habeas counsel discretionary "notwithstanding any other provision of law" was reversed as to capital cases, so that habeas counsel would remain discretionary "*[e]xcept as provided in title 21, United States Code, section 848.*" *See* 141 Cong. Rec. S7812-17 (June 7, 1995) (emphasis added). With only a technical change, this language was enacted in the Act. *See* AEDPA § 104(d), enacting 28 U.S.C. § 2254(h) (the right to counsel in federal habeas cases is discretionary "[e]xcept as provided in section 408 of the Controlled Substances Act [21 U.S.C. § 848(q)]"). Thus, in passing AEDPA, Congress was not only aware of *McFarland*, but considered the primary statute upon which *McFarland* was based and expressly decided to keep it intact.

determined that the reach of *McFarland* was limited to giving effect to congressional intent with regard to two narrow statutory provisions. *See Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997) (*McFarland* was only intended to "resolve practical procedural problems" so that unrepresented, indigent defendants could obtain counsel under 21 U.S.C. § 848(q)); *Williams v. Coyle*, 167 F.3d 1036, 1039 (6th Cir. 1999)(*McFarland's* holding rested solely on the "necessity of expanding the ordinary meaning of a 'pending case' to give effect to clear congressional intent," relating to the statutes at issue).

Whether or not, as these cases conclude, *McFarland*'s rationale could support a *post hoc* judicial narrowing of its holding, *McFarland's* unmistakable ruling that a capital case commences upon the filing of a request for counsel provided the legal backdrop for Congress's 1996 decision to use the broad term "case" in § 107(c) rather than "petition" or "application." *See Square D Company v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 418-420 (1986). Congress's awareness of *McFarland* confirms what the overall language of AEDPA indicates: when Congress used the word "pending" in section 107(c) of AEDPA, Congress presumably intended the word to have the same connotation as it had just been held to embody in the habeas statutes so recently construed, i.e., that a habeas case could become "pending" even in the absence of a formally filed petition.

B. The State's Attempt to Analogize a Habeas Petition to a Civil Complaint for Purposes of Discerning the Meaning of "Case Pending" Is Misplaced

The State attempts to graft Rule 3 of the Federal Rules of Civil Procedure onto the habeas corpus rules. Fed.R.Civ.P. 3 provides that "[a] civil case is commenced by filing a complaint with the court." According to the State, Fed.R.Civ.P. 3 applies to habeas proceedings by virtue

of Rule 11 of the Rules Governing § 2254 Cases, which permits (but does not require) the Rules of Civil Procedure to be applied to habeas corpus proceedings when they are not inconsistent. The State argues that since there is no inconsistency between the habeas rules and Fed.R.Civ.P. 3, a petition commences a habeas case just as a complaint commences a civil case. Pet. Brief, at 11 (citing *Williams v. Coyle*, 167 F.3d at 1038).

There is no evidence that Congress had Fed.R.Civ.P. 3 in mind when it chose to use the words "case pending" in AEDPA's § 107(c) rather than "petitions filed" or "applications filed" or "complaint filed." Moreover, Rule 11 of the Rules Governing § 2254 Cases states that "[t]he federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, *may be applied*, when appropriate, to petitions filed under these rules." (Emphasis added). Thus, Rule 11 recognizes that Civil Rules do not necessarily control habeas corpus proceedings but merely *permit* resort to the Rules of Civil Procedure. Furthermore, the Advisory Committee Notes following Rule 11 indicate that, "[t]he court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice." Rules Governing § 2254 Cases, Rule 11, advisory committee's note. Congress can hardly be expected to express its intent by way of a rule that on its very face does not require the courts to effectuate the supposed intent at all. In addition, Rule 11 only permits the Rules of Civil Procedures to be "applied ... to petitions." Rule 11. A rule of Civil Procedure that can only be applied to a petition does not logically shed any light on whether § 107(c) means a "petition" in the first place.

Reliance on Fed.R.Civ.P. 3 to define when a habeas proceeding commences is also at

odds with this Court's reasoning in *McFarland v. Scott*, which, as discussed above, held that capital habeas cases could be initiated *pre-petition* by the filing of a request for counsel. If Fed.R.Civ.P. 3 controls the meaning of "cases pending" in one statute (AEDPA, § 107(c)), it would presumably also control the meaning of the two statutes at issue in *McFarland* (21 U.S.C. § 848(q)(4)(B), 28 U.S.C. § 2251). Certainly, Congress could not have expected the courts to rely on Fed.R.Civ.P. 3 to divine statutory intent, when this Court rejected this very point with respect to two other habeas statutes, just two short years before AEDPA was passed. *See Square D Company v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. at 419 (Congressional awareness of a court's construction of a statute and the fact that Congress specifically left it undisturbed lends powerful support to its continued viability).

C. The Backdrop Against Which Congress Enacted Section 107(c) Includes its Awareness of the Complexity of Capital Habeas Cases and the Liberal Construction of Pleadings Filed by Pro Se Litigants

While § 107(c) does not explicitly mention Chapter 153, this Court has held that Chapter 153 as well as Chapter 154 "had to have been in mind when § 107(c) was added" to AEDPA, and "[n]othing, indeed, but a different intent explains the different treatment." *Lindh v. Murphy*, 521 U.S. at 329. It is apparent that Congress intended for there to be retroactive application of AEDPA for Chapter 154 cases because a habeas petitioner in such a circumstance theoretically has had the benefits of competent and adequately compensated counsel in state post-conviction proceedings, *see* 28 U.S.C. § 2261, and therefore would be in a better position to comply with Chapter 154's expedited procedures. It is not surprising, however, that Congress determined that in jurisdictions where states had not complied with the statutory requirements of Chapter 154, capital habeas petitioners who were in the process of preparing comprehensive habeas petitions

at the time of AEDPA's enactment would not be subject to its new "standards affecting entitlement to relief." *Lindh v. Murphy*, 521 U.S. at 329. Congress had previously acknowledged, in enacting § 848(q), the uniqueness and complexity of capital habeas proceedings, as well as the importance of legal, investigative, and expert assistance in the preparation of the habeas petition. *See McFarland v. Scott*, 512 U.S. at 855-856. To apply new substantive rules mid-stream would be especially disruptive where these resources had been marshaled to prepare a federal habeas petition under pre-AEDPA law by petitioners who had not had the advantages in state court of those in Chapter 154 jurisdictions.

Of course, Chapter 153 applies not just to non-Chapter 154 capital cases, but also to the "general run of habeas cases." *Lindh v. Murphy*, 521 U.S. at 327. In addition to being mindful of *McFarland* and the duties of habeas counsel in capital cases when it enacted AEDPA, Congress was also certainly aware of the well-established, well-known feature of federal practice that pleadings filed *pro se* by indigent, legally untrained litigants were treated as sufficient to initiate a proceeding if they were filed within the applicable period of limitations and manifested an intention to seek judicial redress. The rule of *Haines v. Kerner*, 404 U.S. 519 (1972), was that such filings were held "to less stringent standards than formal pleadings drafted by lawyers" and were not to be turned away, however "inartfully pleaded." *Id.* at 520. Accord: *e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982); *and see Neitzke v. Williams*, 490 U.S. 319, 330 (1989).[8] Specifically, when the question was whether a

[8] The rule was routinely applied in the courts of appeals. *See, e.g., Alley v. Dodge Hotel*, 501 F.2d 880, 883-886 (D.C. Cir. 1974); *Ayala Serrano v. Lebron Gonzales*, 909 F.2d 8, 12-13 (1st Cir. 1990); *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983); *Nichols v. United States*, 75 F.3d 1137, 1140-1141 (7th Cir.1996). As the Second Circuit explained in *Williams*, 722 F.2d at 1050:

> "due to the *pro se* petitioner's general lack of expertise, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. *See* Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, Tentative Report No. 2, Part IV, Section D at 57 (Federal Judicial Center, 1977). These views are wholly consistent with Supreme Court doctrine, which confirms that *pro se* complaints must be liberally construed, *Haines v. Kerner*, ... The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners."

filing had been made within a statute of limitations or other deadline, the federal practice was clearly settled that an unrepresented indigent litigant's papers would be regarded as timely filed even though they were formally insufficient, so long as they served to provide the kind of notice to the opposing party and the court that the deadline was designed to assure. *Smith v. Barry*, 502 U.S. 244, 248 (1992). *See, e.g., Bradley v. Coughlin*, 671 F.2d 686, 689-690 (2d Cir. 1982); *Hanlin v. Mitchelson*, 794 F. 2d 834, 836, 838-839 (2d. Cir. 1986); *Grune v. Coughlin*, 913 F.2d 41, 43 (2d Cir. 1990); *United States v. Young*, 966 F.2d 164, 165 (5th Cir. 1992); *Pearson v. Gatto*, 933 F.2d 521, 526-527 (7th Cir. 1991); *Listenbee v. City of Milwaukee*, 976 F.2d 348, 349-351 (7th Cir. 1992); *Ray v. Cowley*, 975 F.2d 1478, 1479 (10th Cir. 1992); *Hamilton v. Ford*, 969 F.2d 1006, 1010 n. 2 (11th Cir. 1992).

The teaching of *Smith v. Barry*, 502 U.S. 244, is that a formally deficient pleading will be treated as sufficient to meet a filing deadline if it is the "functional equivalent" of the kind of document that the pleading rules demand. *Id.* at 248. In the context of AEDPA's amendments to Chapter 153, the question of the sufficiency of a filing to commence a habeas corpus proceeding would have been expected by Congress to arise principally in connection with the enforcement of the one-year statute of limitations newly enacted by § 2244(d)(1). And the function of that statute, as of any statute of limitations, is to "put the adversary on notice to defend within the

period of limitation," *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944), and to bring the litigation within the power of the court to control its pace, so as to "spare the courts from litigation of stale claims." *Chase Securities v. Donaldson*, 325 U.S. 304, 314 (1945). *See, e.g., Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965). For these purposes, the specificity of fact pleading and issue identification required of a habeas petition in order to bring it into compliance with the formal pleading rules of 28 U.S.C. § 2242 and Rule 2 of the § 2254 Rules has never been thought necessary. *See, e.g., New York Central & Hudson RiverR.R. Co. v. Kinney*, 260 U.S. 340, 346 (1922) (by Holmes, J.)[6]

Against this backdrop, the Congress that enacted the habeas provisions of AEDPA – which contained a statute of limitations that Congress must have known would be applied primarily to documents received by federal courts from unrepresented, legally unsophisticated prisoners – could not possibly have understood or intended that a document complying with the pleading requirements of 28 U.S.C. § 2242 and Rule 2 of the § 2254 Rules would be demanded in order to commence a "case."

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[6] This is why post-limitations amendments to complaints are permitted even though they add new claims or theories relating to the same basic factual situation that gave rise to a lawsuit filed within the limitations period. *See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 4.23, at p. 278 (5th ed. 2001). In any event, it is inconceivable that Garceau's *McFarland* motion failed to put the State on notice both of Garceau's intention to challenge his capital conviction and of the range of grounds on which he would challenge it. The likelihood that Garceau would *not* carry through on his manifest intention to obtain federal review of a death judgment once he was given counsel for this purpose was nil; and the rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), informed the State that Garceau's federal-court claims would be – and, in fact, were – those that had already been litigated between the parties in the state courts. No less than reviewing courts (*see Ross v. Moffit*, 417 U.S. 600, 614-615 (1974); *Pennsylvania v. Finley*, 481 U.S. 551, 557-558 (1987)), a habeas respondent can discern from previous proceedings in the same case the nature of the claims available to the petitioner.

D. *Lindh v. Murphy* Confirms That Congress Understood That the "Case Pending" Language of § 107(c) Would Not Be Equated with Petitions Filed

This Court's discussion in *Lindh* regarding 28 U.S.C. § 2254(h) further confirms Garceau's reading of § 107(c). As noted earlier, Congress made AEDPA's Chapter 154 revisions applicable to pending capital habeas cases arising out of states that have met specific conditions. It also made some (but not all) of the Chapter 153 amendments applicable to those cases. *See* 28 U.S.C. § 2264(b). Section 2254(h) is a provision dealing with the appointment of counsel in Chapter 153 which AEDPA did not incorporate into pending Chapter 154 proceedings. This Court in *Lindh* sought to explain why Congress would not make this newly enacted subdivision concerning counsel applicable to pending cases litigated under Chapter 154. The Court's explanation was that "[t]here was no need [for Congress] to make subsection (h) immediately available to *pending cases*, capital or not, because 21 U.S.C. § 848(q)(4)(B) already authorized appointment of counsel in *such [pending] cases*." *Lindh*, 521 U.S. at 336.

Given *McFarland*'s prior holding that § 848(q)(4)(B) authorizes the appointment of counsel "prior to the filing of a formal, legally sufficient habeas corpus petition" in a capital case, *McFarland v. Scott*, 512 U.S. at 854-855, the *Lindh* language confirms that capital cases in which counsel has been appointed "prior to the filing of a formal, legally sufficient habeas corpus petition" are "pending cases" within the meaning of AEDPA. Furthermore, the "proceeding ... pending" language of Chapter 153's stay provision, § 2251, cannot be meaningfully distinguished from the "cases pending" language of section 107(c), which as *Lindh* concluded, "implicitly" governs the applicability of "the amendments to chapter 153." *Lindh v. Murphy*, 521 U.S. at 326-27.

The language of the statute when considered in the context of *Lindh* and *McFarland* leads to the conclusion that a request for appointment of counsel, coupled with a motion for stay of execution, constitutes a "pending case." This is exemplified in Garceau's case, where not only were these pleadings filed, but after counsel was appointed and the stay was granted, the State moved to vacate an extension of the stay, which was denied after Garceau filed a notice of exhausted colorable federal constitutional claims to be presented. As discussed below, this pre-petition litigation had all the attributes of a "case."

II.

THE FILING OF A MOTION FOR THE APPOINTMENT OF FEDERAL HABEAS COUNSEL AND FOR A STAY OF EXECUTION, AND THE SUBSEQUENT FILING OF A PLEADING WHICH SETS FORTH COLORABLE EXHAUSTED FEDERAL CLAIMS CONSTITUTE A "PENDING CASE" SUCH THAT AMENDED CHAPTER 153 OF AEDPA CANNOT BE APPLIED RETROACTIVELY

In California, after a petitioner under sentence of death initiates federal proceedings by requesting counsel and a stay of execution, local rules and practice have created additional procedures which remove any doubt that there is a "case pending" prior to the filing of a formal habeas petition. For example, motions for the appointment of federal counsel and for pre-petition stays of execution can and have been contested. In addition, after habeas counsel's appointment, a subsequent pleading called a "Specification of Nonfrivolous Issues" must be filed, based on which the district court judge makes a preliminary merits determination to justify an extension of the stay of execution to permit preparation of the habeas petition.

Accordingly, Garceau engaged in pre-petition litigation, prior to AEDPA's enactment, which provided the State with notice of claims and included an assessment by the district court

that Garceau had at least one nonfrivolous federal constitutional claim. After counsel was appointed, and an extension of the original stay of execution was granted to permit preparation of the habeas petition, the State moved to vacate the stay. The State contended that newly appointed counsel had prior familiarity with the case, was not entitled to a pre-petition stay, and therefore was required to file a petition forthwith. The State also argued that counsel had provided only a conclusory statement that counsel believed there were meritorious federal constitutional claims rather than providing notice of specific claims as required by local rules. Resp. App. 220. Garceau subsequently filed a "Specification of Nonfrivolous Issues," which identified potential federal constitutional claims that were among the issues to be raised in a petition for writ of habeas corpus, and also filed a brief in opposition to the motion to vacate the stay. Resp. App. 225-233.

The "Specification of Nonfrivolous Issues," is a pleading required under the local rules for the U.S. District Court, Eastern District of California ("L.R.") which formalizes as a matter of standard procedure the identification of at least some colorable federal claim to warrant a further stay of execution.[10] The rule, entitled "Temporary Stay for Preparation of the Petition," provides as follows:

> . . . upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented.

L.R. 81-191(h)(3).

After a hearing, the district court denied the State's motion to vacate, and Garceau then

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[10] Such a pleading is required by the local rules of the other district courts in California as well. *See, e.g., Brown v. Vasquez*, 952 F.2d 1164, 1165 n.2 (9th Cir. 1992).

obtained a further stay of execution to permit the filing of the habeas petition within nine months. Resp. App. 239-241.

Garceau's filings to initiate federal proceedings, the State's opposition, and the district court's orders and rulings represent the kind of adversarial judicial proceedings that constitute a "case" under the reasoning of this Court's decisions in *Hohn v. United States*, 524 U.S. 236, and *Slack v. McDaniel*, 529 U.S. 473. *See also McFarland v. Scott*, 512 U.S. at 860-862 (O'Connor, J., concurring in part and dissenting in part)(suggesting that capital defendants must make a showing of the existence of at least some colorable federal claim before a stay of execution may be entered).[11]

In *Hohn*, this Court considered whether it had jurisdiction under 28 U.S.C. § 2253(c) to review decisions of the courts of appeals which denied applications for certificates of appealability ("COA"). Pursuant to 28 U.S.C. § 1254, "[c]ases in the courts of appeals may be reviewed by the Supreme Court" by several methods including certiorari. The Court determined that an application for a COA constituted a "case."

> There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1). As we have noted, "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes ..., each meaning a proceeding in court, a suit, or action." *Blyew v. United States*, 80 U.S. 581, 13 Wall. 581, 595, 20 L.Ed. 638 (1871). The dispute over Hohn's entitlement to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and redressable injury, *i.e.*, wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a "case" as the term is used in both Article III of the Constitution and the statute here under construction.

[11] By contrast, in each of the cases from other jurisdictions relied on by the State, there is no indication that anything but a notice of intent to file petition, motion for the appointment of counsel and/or request for stay of execution were filed prior to the filing of the petition. *See Isaacs v. Head*, 300 F.3d 1232, 1237 (11th Cir. 2002)(Georgia); *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999), and *Holman v. Gilmore*, 126 F.3d 876, 879 (7th Cir. 1997)(Illinois); *Williams v. Cain*, 125 F.3d at 273 (Louisiana); *Williams v. Coyle*, 167 F.3d at 1037 (Ohio); *Moore v. Gibson*, 195 F.3d 1152, 1161 (10th Cir. 1999)(Oklahoma); *see also Nobles v. Johnson*, 127 F.3d 409, 412 (5th Cir. 1997)(Texas).

Hohn, 524 U.S. at 241.

The State contends that reliance on *Hohn* is misguided because it uses the term "case" in a significantly different context, and in particular that unlike the proceedings at issue here, an application for a COA relates to the merits of a habeas case. However, under the local rules, as noted above, the district court is required to review the Specification of Nonfrivolous Issues and make a determination that "nonfrivolous issues" are presented to issue a temporary stay of execution to permit the preparation and filing of a petition. This would seem to address the concerns of the cases relied on by the State which reject the notion that a motion for the appointment of counsel commences a habeas case under AEDPA because "it has no relation to the merits of a habeas petition . . . ." *Isaacs v. Head*, 300 F.3d at 1245; *see also Gosier v. Welborn*, 175 F.3d at 506; *Williams v. Coyle*, 167 F.3d at 1040.

In any event, this Court in *Hohn* rejected the distinction between a preliminary filing and a challenge to the merits in determining the meaning of a "case."

> In *Ex Parte Quirin*, 317 U.S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for writ of habeas corpus was a case in a district court....We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request.

Hohn, 524 U.S. at 246. If, as in *Quirin*, a request for leave to file a habeas petition constitutes a "case," then a request that counsel be appointed for the purpose of filing a habeas petition must

also constitute a case.

In *Hohn*, rather than considering whether or not an application for a COA constitutes a threshold inquiry as opposed to a merits inquiry, the Court looked to whether the application for a COA constituted an adversary proceeding, *id.* at 241, and whether the decision on whether to grant or deny a COA was "judicial in nature" as opposed to merely being the product of an administrative function. *Id.* at 245.

Motions for appointment of counsel and for a stay of execution are adversary proceedings. In *McFarland*, this Court anticipated that motions for counsel and for stays would be contested, indicating that when such motions were denied they would be reviewed for abuse of discretion. *McFarland*, 512 U.S. at 858. Indeed, there have been cases in which rulings on such motions have been reviewed by appellate courts, indicating both the adversarial and judicial nature of the proceedings. *See, e.g., In re Parker*, 49 F.3d 204 (6th Cir. 1995)(district court granted *McFarland* stay; writ taken and appellate court reversed; rehearing and suggestion for rehearing en banc denied); *Cantu-tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998)(motion for appointment of counsel and for stay of execution denied by district court where petition would be time-barred; appellate court granted motion for appointment of counsel limited to litigating the limitations bar and denied motion for stay); *Gosier v. Welborn*, 175 F.3d at 506 (request for counsel was reviewed on appeal after the district judge dismissed the application).

Furthermore, as noted above, in Garceau's case, the State not only appeared, it filed and litigated a motion to vacate an extension of the stay of execution. *See Hohn*, 524 U.S. at 249 (Court concluded that there was adversity where "the Government entered an appearance in response to the initial application and filed a response opposing Hohn's petition for rehearing and

suggestion for rehearing en banc"). While a case does not lack adversity where an opposing party acquiesces in a particular matter that it could otherwise contest, *see Hohn*, 524 U.S. at 248 ("It would have made no difference had the Government declined to oppose Hohn's application for a certificate of appealability"), the fact that the State filed a motion to vacate the stay of execution in Garceau's case amply illustrates the adversarial nature of pre-petition procedures in California federal habeas proceedings.

Moreover, the district court's function in pre-petition proceedings in California is judicial in nature and does not consist of mere ministerial acts. Garceau's case exemplifies this fact. Both parties made appearances, submitted briefs, the district court denied the State's motion to vacate a stay of execution and made, at least implicitly, a finding that there were federal constitutional claims of sufficient merit to permit a further stay of execution pending the filing of a habeas corpus petition. These proceedings must be considered to have sufficient attributes to constitute a case.

In *Slack v. McDaniel*, 529 U.S. 473, this Court addressed whether AEDPA should apply to an appeal in which the COA was filed after AEDPA's enactment even though the district court proceedings were not subject to AEDPA. The Court reasoned that an application for a COA "initiates" proceedings in appellate courts, and commences an appellate case such that AEDPA would apply to appellate court proceedings filed after AEDPA's enactment. *Id.* at 481-482. Similarly, a request for counsel initiates proceedings in the district court and should be understood to commence a "case" for purposes of determining AEDPA's applicability in district court proceedings.

Moreover, the Specification of Nonfrivolous Issues filed in California federal district

courts is not unlike an application for the issuance of a COA in the appellate context. Both involve threshold determinations by the respective courts to ensure there are claims with sufficient merit for the case to go forward. *See* 28 U.S.C. § 2253(c)(2)(COA may issue only if "the applicant has made a substantial showing of the denial of a constitutional right."); L.R. 81-191(h)(3) (temporary stay of execution to permit preparation of the petition shall issue "unless no nonfrivolous issues are presented."). Thus, at minimum, the filing of a notice of colorable claims should be considered commencing a "case" in the district court in the way that the filing of a request for a COA commences a case in the appellate courts. *See Slack v. McDaniel*, 529 U.S. at 481-482.

The State argues that *Slack's* recognition that an appellate case may be subject to AEDPA even though the underlying district court case was not, supports its view that there is no requirement for a habeas case to be viewed as a unified whole. Pet. Brief, at 15-16. It follows, according to the State, that since a habeas proceeding can be divided into a district court "case" and an appellate "case," it could be further divided into a "pre-petition" case and a "petition" case. According to the State, it is only the case commenced by a "petition" that triggers the retroactivity provisions of AEDPA. This reductionist reasoning cannot possibly be what Congress intended when it used the phrase "case pending." Indeed, while Congress's creation of a gatekeeping provision in 28 U.S.C. § 2253, may have indicated a bifurcation between the district court case and the appeal, there is nothing that suggests that the district court "case" should be broken down any further.

The State's brief is devoid of any reasoned basis to conclude that the filing of a habeas petition is necessary for a case to be considered pending under AEDPA. Congress's use of the

phrase "case pending" in the wake of this Court's holding in *McFarland*, and the subsequent decisions in *Lindh*, *Hohn* and *Slack* make clear that when Garceau filed his motion seeking the appointment of counsel and a stay of execution – and when he obtained a further pre-petition stay by identifying colorable claims as required by the local habeas rules and by successfully opposing (both in writing and at a hearing) the State's motion to vacate the stay – his case was pending, and Chapter 153 of AEDPA does not apply to his habeas proceedings.

III.

A DETERMINATION OF THE MERITS OF GARCEAU'S UNDERLYING DUE PROCESS CLAIM UNDER AEDPA IS NOT FAIRLY INCLUDED OR COMPRISED WITHIN THE STATED QUESTION AND SHOULD BE ADDRESSED IN THE FIRST INSTANCE BY THE COURTS BELOW

This Court "disapprove[s] the practice of smuggling additional questions into the case after [it] grant[s] certiorari," *Irvine v. California*, 347 U.S. 128, 129 (1954), and has "consistently declined to consider issues not raised in the petition for a writ of certiorari." *Caspari v. Bohlen*, 510 U.S. 383, 388 (1994)(citing Supreme Court Rule 14.1(a)). As this Court explained, "[t]he Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart the system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Thus, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a).

This Court granted review to address one question: when is a capital habeas case "pending" in federal court for purposes of determining whether Chapter 153 of AEDPA can be applied? As the State originally put it, "[t]his petition for certiorari asks this Court to resolve the

disagreement between the circuits as to the correct trigger event for determining the application of the AEDPA in capital cases." Cert. Pet., at 5. Resolution of this question, as discussed above, requires a determination of Congressional intent through the parsing of the statutory language and a review of this Court's precedent. It does not in any way depend on the underlying facts of Garceau's habeas claims. Nevertheless, the State's Brief on the Merits asks this Court for the first time to decide Garceau's claim that the instruction on criminal propensity given at trial violated due process and was prejudicial.

The State's effort to inject this additional question for the Court to consider is improper. Contrary to the State's suggestion, a merits determination of Garceau's due process claim is not fairly included or comprised within the above-stated question. Moreover, since this case was not litigated under AEDPA, the courts below have not had an opportunity to apply AEDPA's standard of review provisions to Garceau's claims in the first instance.[12]

While Rule 14.1(a) provides that "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," questions that are merely "related" or "complementary" to the question presented are "not fairly included therein." *Yee v. Escondido*, 503 U.S. 519, 537-538 (1992). Issues that are "analytically and factually" distinct, are not fairly included in the question presented. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993)(per curiam).

In *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002), this Court held that the Court of Appeals did not apply the proper standard in finding that

[12] For the same reasons, this Court should ignore the arguments of the amicus brief which also seek a resolution of the underlying due process claim. *See United States v. Dion*, 476 U.S. 734 (1986).

the respondent was disabled under the Americans with Disabilities Act of 1990. In holding that it was therefore inappropriate for the appellate court to have granted partial summary judgment for respondent, this Court declined to reinstate the district court's grant of summary judgment for petitioner because the petition for certiorari did not seek summary judgment and argued only that the appellate court's reasons for granting relief to respondent were unsound. *Id.*, 122 S. Ct. at 694. Similarly, the State in this case argued in its Petition for a Writ of Certiorari that the Court of Appeals should have decided Garceau's due process claim under AEDPA, but did not ask this Court to resolve that claim.

Indeed, such a question is "wholly divorced" from the question on which this Court granted review. *See Caspari v. Bohlen*, 510 U.S. at 389-390. While a determination as to whether AEDPA applies to Garceau's case may affect the resolution of Garceau's federal due process claim on which the court of appeal granted relief, the converse is certainly not true. The merits of Garceau's constitutional claims as they might be affected by AEDPA's scope of review are "analytically and factually" distinct from how AEDPA itself should be interpreted. His due process claim cannot reasonably be characterized as a subsidiary question subsumed within the State's statutory-construction Question Presented or as a question that must be answered as a predicate to the resolution of the Question Presented as to AEDPA's temporal reach. *See Caspari v. Bohlen*, 510 U.S. at 390; *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 381-382 (1995)(question regarded as embraced within the petition where it is "both prior to the clearly presented question and dependent upon many of the same factual inquiries").

While the State has led this Court to believe that adjudication of Garceau's due process claim under AEDPA is an issue which this Court can address simply, it is, in fact, a complex and

fact-laden inquiry for which the lower courts with greater familiarity with the trial and appellate record are better equipped. Moreover, as discussed above, neither the district court nor the appellate court applied AEDPA to Garceau's claims. Assuming this Court finds that AEDPA applies to Garceau's case, there is no reason why this case should not be remanded to the lower courts to review Garceau's claims under the standard of review set forth in AEDPA in the first instance after full briefing and careful examination of the trial record. *See Glover v. United States*, 531 U.S. 198 (2001); *United States v. Winstar Corporation*, 518 U.S. 839, 860 (1996).

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: December 20, 2002

Respectfully submitted

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CAPITAL CASE
No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN OF SAN QUENTIN STATE PRISON, *Petitioner,*

v.

ROBERT F. GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1862

JEANNE WOODFORD, WARDEN OF SAN QUENTIN STATE PRISON, *Petitioner,*

v.

ROBERT F. GARCEAU, *Respondent.*

ARGUMENT

I.

THE APPLICATION OF AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL PETITION WAS FILED

Chapter 153 of the Antiterrorism and Effective Death Penalty Act (AEDPA) applies to applications for writ of habeas corpus, in both capital and noncapital cases, filed after the Act's April 24, 1996, effective date. This Court has already applied this rule in one capital case. *Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case. See *Lindh v. Murphy*, 521 U.S. 320, 326-327 . . . (1997)."). [1/] The

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1. In *Williams*, 529 U.S. 420, the requests for counsel and stay of execution, and the formal petition, were filed after

same rule is applied in noncapital cases. *Lindh v. Murphy*, 521 U.S. at 327 (Chapter 153 applies to "the general run of cases only when those cases had been filed after the date of the Act."); *Slack v. McDaniel*, 529 U.S. 473, 474 (2000) (28 U.S.C. § 2254 of Chapter 153 applies to cases filed in the district court post-AEDPA.) In a capital case filed after the enactment of AEDPA, the filing of requests for counsel and stay of execution prior to the enactment of AEDPA does not alter this rule.

A. The Express Language Of Chapter 153 Demonstrates The Application Of Its Provisions Should Be Triggered By The Filing Of The Application For Writ Of Habeas Corpus

The express language of Chapter 153 provides that the filing date of an application for habeas corpus is the relevant date for determining the application of AEDPA in all cases. An analysis of AEDPA's provisions begins with the words of the statute, which "must be given their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams*, 529 U.S. at 421. Virtually every provision of Chapter 153 expressly references and applies to filed applications for writs of habeas corpus. *See* 28 U.S.C. §§ 2241(b) and (d), 2242-2250, 2254. *See also McFarland v. Scott*, 512 U.S. 849, 862 (1994) (O'Connor, J., concurring in part and dissenting in part) (the provisions of the pre-AEDPA habeas corpus statute, and the Rules Governing § 2254 Cases, indicate that a "pending" case is created by the filing of the habeas corpus petition.)[2/]

AEDPA's enactment. The Court identified the filing of the petition as the determinative event.

2. The only sections of Chapter 153 referencing something other than an application for writ of habeas corpus are: 28 U.S.C. § 2251, which grants federal judges "before whom a habeas corpus proceeding is pending" authority to stay state court proceedings; 28 U.S.C. § 2252, concerning notice of the "habeas corpus proceeding"; 28 U.S.C. § 2253, concerning an appeal from a "habeas corpus proceeding"; and 28 U.S.C. § 2255, which governs motions by federal prisoners challenging sentences.

Garceau ignores the plain language of Chapter 153 to justify his conclusion that, in capital cases, the filing date of the requests for appointment of counsel and stay of execution is the relevant trigger event for determining whether AEDPA applies to an application. Garceau concludes that his case was "pending" at that time and that AEDPA does not apply to his case pursuant to *Lindh v. Murphy*, 521 U.S. at 327, even though his first petition was not filed until after AEDPA's effective date. (Resp. Brf. at 7-13.)

Garceau ignores the express references in Chapter 153 to "application[s]" and relies on the retroactivity provision of Chapter 154 (section 107(c))[3/] to support his argument. He repeatedly refers to the language of this provision and argues its meaning. (*See* Resp. Brief at 7-12, 14-15, 19.) Garceau's reliance on this section is misplaced.[4/]

Section 107(c) applies Chapter 154 to "cases pending on or after the date of enactment." This language is not contained in Chapter 153. In fact, the absence of this language in Chapter 153 was the basis for *Lindh*'s negative inference that Congress did not intend that chapter to apply retroactively.

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3. Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c).

4. Despite Garceau's reliance on Chapter 154's retroactivity provision, he acknowledges that Chapter 154 does not apply, and that the only issue before the Court is whether Chapter 153 applies to his case. (Resp. Brf. at 7, n. 2.)

Lindh, 521 U.S. at 330. Chapters 153 and 154 also have different purposes: Chapter 153 establishes new standards for "the general run of habeas cases"; Chapter 154 creates "an entirely new chapter" establishing new standards for review of habeas applications by state prisoners under capital sentences. *Id.* at 327, 329. Chapter 154 contains "special rules favorable to the state if conditions are met." *Id.* at 327. "Nothing . . . but a different intent explains the different treatment [of the chapters]." *Id.* at 329. The express language of Chapter 153 indicates that the proper event for determining the application of Chapter 153 is the filing date of the formal habeas corpus application.

When Congress enacted section 107(c), it intended Chapter 154 to apply to pending cases with a qualifying state post-conviction mechanism for representation by competent counsel. To accomplish its intent, Congress did not need to distinguish between the pre-application and post-application habeas proceedings recognized by this Court in *McFarland*, 512 U.S. 849. Accordingly, while section 107(c) gave rise to the negative inference that Chapter 153 did not apply to any pending case not covered by Chapter 154, the phrase "cases pending" in section 107(c) does not otherwise help define a "case" under Chapter 153. Indeed, the most natural reading of "cases pending" in the context of Chapter 153 would be that it applies to the "general run of habeas cases," which are initiated by an application. There is no indication that Congress intended an additional distinction in capital cases based on *McFarland*.

Garceau's position means an unnecessarily smaller number of capital cases are subject to AEDPA's newly-enacted provisions, thereby thwarting the purposes of AEDPA to further the principles of comity, finality, and federalism (*Duncan v. Walker*, 533 U.S. 167, 178 (2001)), eliminate delays in the execution of state and federal criminal sentences (*Hohn v. United States*, 524 U.S. 236, 264 (1998) (Scalia, J., dissent); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), overruled in *Calderon v. United*

States District Court (Kelly), 163 F.3d 530 (1998)), grant greater deference to state court convictions (*Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1849 (2002) (AEDPA prevents federal habeas "retrials" and ensures that state-court convictions are given effect to the extent possible under law)), and enhance the states' capacities to control their own adjudications (*Lindh*, 521 U.S. at 333, n. 7). In Garceau's case, the failure to apply AEDPA resulted in the Ninth Circuit's reversal of his state death penalty conviction.

B. The Plain Meaning Of "Pending" Demonstrates The Application Of Chapter 153's Provisions Should Be Triggered By The Filing Of The Application For Writ Of Habeas Corpus

The plain meaning of the term "pending," as relevant to Chapter 153, also indicates that the filing of the an application for habeas corpus relief is the trigger event for applying the chapter. The Federal Rules of Civil Procedure (FRCP) may apply to habeas corpus cases when they are not inconsistent with the habeas rules. Rules Governing § 2254 Cases, Rule 11. Under FRCP 3, a civil action is normally commenced by the filing of a complaint with the court. No inconsistency prevents the application of FRCP 3 to find that a habeas corpus case commences with the filing of the application for habeas relief. *Calderon v. United States District Court (Beeler)*, 128 F.3d at 1287 n.3.

Garceau correctly asserts that the definition of "pending" can vary depending on the particular provision of AEDPA. *McFarland v. Scott*, 512 U.S. at 856-57 (a request for stay of execution under 28 U.S.C. § 2251, following a pre-application appointment of counsel under 21 U.S.C. § 848(q)(4)(B), constituted a pending habeas corpus proceeding despite the absence of a filed petition); *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 2138 (2002) ("pending" in the context

of the federal statute of limitations (28 U.S.C. § 2244(d)(2)) can include gaps when state petitions were not on file); *Slack v. McDaniel*, 529 U.S. 473 (an application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) constituted a pending case for purpose of applying AEDPA).

These varied interpretations of "pending" support the State's argument. In each case, "pending" is defined in the context of the statutory provision being interpreted, with the intention of best effectuating the statute's purpose. In determining whether a capital case is "pending" for purposes of Chapter 153, the provision's express language, its purpose, and the related Federal Rules of Civil Procedure, dictate the plain meaning of "pending" be applied to find that the filing date of the application is the correct trigger event.

Garceau asserts that *McFarland*, 512 U.S. 849, affects the meaning of "pending" because Congress was aware of the case when it enacted section 107(c). However, as discussed above, the provisions of section 107(c) have no application to the issue before this Court.[5] Moreover, the terms "petition" and "application" repeatedly appear in Chapter 153. Furthermore, no court, including the Ninth Circuit, has concluded that *McFarland* by itself supports reading Chapter 153 in the manner that is advocated by respondent Garceau. *Beeler*, 128 F.3d at 1287 n.3. *McFarland*'s purpose is very narrow: interpreting 21 U.S.C. § 848(q)(4)(B), which creates a statutory right to habeas counsel in post-conviction proceedings in capital cases, and reconciling it with 28 U.S.C. § 2251, which grants federal courts the authority to issue a stay of execution in habeas corpus proceedings to permit counsel to prepare the petition. *Id.*

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5. In Respondent's Brief, at 12, footnote 7, he discusses specific Congressional consideration of *McFarland* during the debates on AEDPA. The case was discussed because one of AEDPA's provisions amended 21 U.S.C. § 848(q), and not because it affected Chapter 153.

at 858.

Garceau speculates that the correct trigger event for the application of Chapter 153 is influenced by Congressional awareness of the complexity of capital habeas cases and the liberal construction of pleadings allowed pro se litigants. (Resp. Brief at 15.) His conjecture is meritless.

Garceau's first argument is based on perceived differences between Chapter 154 capital applicants who have benefitted from a qualifying state post-conviction mechanism, and Chapter 153 capital applicants. He asserts that capital habeas petitioners in the process of preparing comprehensive habeas petitions at the time of AEDPA's enactment were not made subject to the new provisions of 28 U.S.C. § 2254(d), establishing new standards for entitlement to relief, because it would be too disruptive for applicants who had not had the benefit of a qualifying state mechanism. This statement is untrue and Garceau provides no support for it other than an inapplicable reference to *Lindh v. Murphy*, 521 U.S. at 329. (Resp. Brief at 15-16.) To the extent Congress distinguished between Chapter 153 and Chapter 154 applicants, the distinction Garceau propounds does not explain why Congress would further innoculate potential applicants from Chapter 153 merely because they had initiated pre-application proceedings under *McFarland*. Furthermore, a represented capital petitioner is presumably in a better position to comply with the requirements of AEDPA than a pro per noncapital petitioner, who is subject to AEDPA's provisions based on the filing of the application for habeas corpus.

Garceau's second argument is also meritless. He argues that, in enacting AEDPA, Congress was mindful that unrepresented pro per habeas petitioners are subject to less stringent filing requirements. The implication appears to be that, despite the habeas pleading requirements contained in 28 U.S.C. §2242, and Rules Governing § 2254 Cases, Rule 2, Congress intended that a Chapter 153 pending habeas case could begin with the filing of a document that merely placed the

State on notice of the claims to be later raised in the formal habeas petition. However, Garceau and other capital petitioners are not unrepresented. Furthermore, under AEDPA, the existing habeas pleading requirements remain intact.

The cases offered by Garceau to support his claim of a lowered pleading requirement interpret civil, rather than habeas, pleading requirements and are inapplicable. Unlike a civil complaint, a habeas petition "must meet heightened pleading requirements." *McFarland*, 512 U.S. at 856 (citing Rules Governing § 2254 Cases, Rule 2). It is required to allege the factual underpinnings of the petitioner's claims. *Id.* at 860 (O'Conner, J., concurring in part and dissenting in part); *Blackledge v. Alison*, 431 U.S. 63, 75 n. 7 (1977) (citing the Advisory Committee Note to Rule 4, Rules Governing Habeas Corpus Cases: "'(N)otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error'").

Garceau asserts that *Lindh* contains language supporting his interpretation of "pending." (Resp. Brief at 19.) *Lindh*, in the course of explaining its conclusion that Chapter 153 was nonretroactive, explained that section 2254(h), providing for appointment of counsel, was not incorporated into Chapter 154 because counsel was already authorized in these cases. *Id.* at 335-36. Thus, *Lindh*'s use of the phrase "cases pending" only explained why a specific provision of Chapter 153 was omitted from Chapter 154 since counsel was already appointed under 21 U.S.C. § 848(q)(4)(B) and *McFarland*. In context, *Lindh*'s terminology did not amount to a holding that Chapter 153 did not apply to cases in which the applicant had only commenced a *McFarland* proceeding. This isolated phraseology does not in any way support Garceau's argument.

II.

GARCEAU'S REQUESTS FOR APPOINTMENT OF COUNSEL AND STAY OF EXECUTION, AND SPECIFICATION OF NONFRIVOLOUS CLAIMS, DID NOT COMMENCE A PENDING HABEAS CORPUS CASE FOR PURPOSE OF DETERMINING THE APPLICATION OF CHAPTER 153

Garceau argues that a pending case for purposes of Chapter 153 was commenced by the filing of his requests for appointment of counsel and stay of execution, and the filing of a "Specification of Nonfrivolous Issues." (Resp. App. 225-229.) Under the local federal court rules, the Specification of Nonfrivolous Issues was required to support the issuance of a temporary stay of execution to permit the preparation of a petition. Local Rules of the United States District Court, Eastern District, Rule 81-191(h).[6/]

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6. The rule was then Local Rule 191(h)(3). This provision stated in relevant part:

> . . . upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented.

(The relevant local rules are attached as an appendix to this reply brief.) Garceau's filed document alleged only two constitutional violations -- a small part of the twenty-eight claims ultimately raised in the formal habeas petition. The document did not purport to be, nor did it satisfy any of the requirements for, a formal habeas petition. Significantly, the

In support of his claim, Garceau first looks to *Hohn v. United States*, 524 U.S. 236, and *Ex Parte Quirin*, 317 U.S. 1 (1942). These cases found that the denial of a request for certificate of appealability or request to file a petition constituted the determination of an Article III "case or controversy," reviewable by this Court under 28 U.S.C. § 1254. Characteristics of such a "case" include an immediate and redressable injury, and adversity. (*Hohn*, 524 U.S. at 240.) Garceau then analogizes the *McFarland* requests for appointment of counsel and stay to a "case" as described in *Hohn* and *Ex Parte Quirin*. However, *Hohn and Ex Parte Quirin* involve significantly different provisions than those in *McFarland*, and all of these cases involve different provisions than those involved in Chapter 153. These cases provide no guidance in determining the event that commences a habeas proceeding under AEDPA.

It is immaterial that the State challenged the sufficiency of Garceau's request for a stay of execution to prepare his habeas petition. His request contained only a conclusory statement that Garceau intended to file unspecified multiple meritorious claims of constitutional violations, and did not even include the required listing of nonfrivolous claims. (Resp. App. at 205, 220.) This local rule error was corrected with the filing of the Specification of Nonfrivolous Claims. (Resp.App. 225-229.) The Specification of Nonfrivolous Claims only assists the district court in determining whether to exercise its discretionary stay authority under 28 U.S.C. § 2251. *McFarland*, 512 U.S. at 858 (issuance of stay is discretionary).

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local rules do not contemplate that the "Specification of Nonfrivolous Issues" will constitute an application for habeas relief. They do not require a responsive pleading or answer from the State. In fact, the local rules specifically distinguish between pre-application procedures and the application itself which inaugurates the actual merits case.

This filing does not constitute a petition on the merits.[7/]

The Specification is also not the same nature as a request for a certificate of appealability, the denial of which prevents a habeas petitioner from appealing on the merits of his case. (See Resp. Brief at 26, relying on *Slack v. McDaniel*, 529 U.S. at 481-82.) The granting of a request for appointment of counsel and stay of execution does not determine the ultimate consideration of a petitioner's claims. It does not even ensure that a petition will ultimately be filed. Conversely, the denial of a request for appointment of counsel or a stay of execution does not necessarily mean that an application will not be filed.

The filing of a petition is a "distinct[ly]" different step from the pre-application process. In short, "[w]hen Congress instructs us (as *Lindh* says it has) that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to" reviewing the constitutionality of an applicant's custody is the case initiated by the application for relief. *Slack*, 529 U.S. at 481-82.

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7. Garceau notes that the district court referred to the first formal habeas petition as an "amended petition." (Resp. Brief at 2, n. 1; Resp. App. at 211.) The State objected to the use of this term and noted that it was apparently used in error. (Resp. App. at 219.)

III.

THIS COURT MAY DETERMINE THE MERITS OF THE CASE BASED ON THE PROPER APPLICATION OF AEDPA'S PROVISIONS

The State asks this Court to apply the provisions of AEDPA and resolve this case on the merits. As provided in Supreme Court Rule 14.1(a), the question presented in the petition for certiorari is "deemed to comprise every subsidiary question fairly included therein. . . ." Questions "fairly included [in the question presented], will be considered by the Court." *Id.*[8/]

The State asks this Court to resolve the issue of whether Chapter 153 applies to Garceau's, and other similarly situated, capital cases. Once the standard of review is resolved, the only remaining legal issue will be whether the California Supreme Court, in its well written opinion adjudicating this instructional error claim, reasonably applied this Court's existing precedents, as articulated in *Estelle v. McGuire*, 502 U.S. 62 (1991), *Chapman v. California*, 386 U.S. 18 (1967) (harmless error on direct state review), and *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (harmless error on federal

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8. Respondent contends that this issue is not "fairly included" in the question presented. Even if true, this Court will still consider such issues in "exceptional cases" "where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). In Garceau's case, resolution of this issue could mean the difference between a full-scale retrial in his case or simply a resolution of other issues still pending in his federal habeas corpus case. Resolution of this one particular issue now is consistent with AEDPA's objectives.

habeas review). The California Supreme Court's assumption of a due process violation and determination of harmless error beyond a reasonable doubt did not involve an unreasonable application of these precedents. The underlying claim of constitutional error was raised and fully briefed below, and no unfairness will result from this Court performing a merits determination.[9/]

Garceau asserts that it is a fact-laden inquiry requiring remand due to the lower court's familiarity with the trial and appellate record. On the contrary, under the correct application of 28 U.S.C. § 2254(d), the California Supreme Court's well written decision (Pet. App. 138, *et seq.*) must be reviewed under a highly deferential standard and upheld unless it is objectively unreasonable. *Woodford v. Visciotti*, __ U.S. __, 123 S.Ct. 357, 360-61 (2002), *per curium*. Assisting in the assessment of "objective reasonableness" is the fact that United States District Court Judge Oliver W. Wanger also found harmless error. Furthermore, a review of the decisions of the California Supreme Court, federal district court, and Ninth Circuit, provided summaries of all of the evidence relevant to the harmless error analysis. (Pet. App. 1, 35, 105.) The requested analysis is much like this Court recently performed in *Woodford v. Visciotti*, 123 S.Ct. 357 (determination that state prejudice determination on an ineffective assistance of counsel claim was objectively reasonable).

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9. The California Supreme Court assumed without deciding this issue. (Pet. App. 141.) Of course, if a state court conclusion that the instructional claim was not a due process violation would be "objectively reasonable" under AEDPA then any harmless error analysis would also be "objectively reasonable" under AEDPA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: January 10, 2003

Respectfully submitted,

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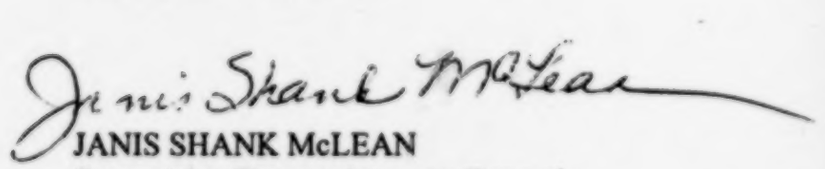

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APPENDIX TO PETITIONER'S REPLY BRIEF ON THE MERITS

APPENDIX

RULE 190. PETITIONS FOR HABEAS CORPUS AND MOTIONS PURSUANT TO 28 U.S.C. § 2255

(a) Scope of This Rule. All petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2254 and motions filed pursuant to 28 U.S.C. § 2255 shall be subject to the provisions of this Rule unless otherwise ordered by the Court.

(b) Form of Petitions and Motions. The petition or motion shall be printed in ink or typewritten, and signed under penalty of perjury, and, if presented in propria persona, upon the form and in accordance with the instructions approved by the Court. Copies of the forms and instructions shall be supplied by the Clerk upon request. In the event a petition or motion is submitted that is not in the proper form, the Clerk shall forthwith mail the proper form and instructions to the person submitting the petition or making the motion.

(c) Filing. Petitions and motions shall be addressed to the Clerk of the United States District Court for the Eastern District of California, 650 Capitol Mall, Sacramento, California 95814, or 1130 "O" Street, Fresno, California 93721, according to L.R. 120(b). Petitioners shall send to the Clerk an original and two copies of the completed petition or motion. No petition or motion shall be addressed to an individual Judge or Magistrate Judge.

(d) Assignment. Petitions shall be assigned by the Clerk pursuant to L.R. 122, provided that motions under 28 U.S.C. § 2255 shall, if possible, be assigned to the sentencing Judge or Magistrate Judge. If, in the same matter in this Court, the petitioner has previously filed a petition for relief or for a stay of enforcement, the new petition shall be assigned to the Judge or Magistrate Judge who considered the prior matter.

(e) Contents.

(1) All petitions by state prisoners shall state with specificity that all issues raised in the petition, either:

(A) have been raised before all state tribunals in which the issues could be heard, to the exhaustion of petitioner's state remedies; or

(B) have not been raised before all state tribunals in which the issues could be heard, in which case the petition shall also set forth all facts which justify the failure to exhaust state remedies.

(2) All petitions shall state whether or not petitioner has previously sought relief arising out of the same matter from this Court or any other federal court, together with the ruling and reasons given for denial of relief.

(3) In a capital case the petition shall set forth any scheduled execution date.

(f) Where Relief Granted. If relief is granted on a petition of a state prisoner, or if any stay of execution of state court judgment is issued by the Court, the Clerk shall forthwith notify the state authority having jurisdiction over the prisoner of the action taken.

Eff. Dec. 19, 1994

RULE 191. SPECIAL REQUIREMENTS FOR HABEAS CORPUS PETITIONS INVOLVING THE DEATH PENALTY

(a) Applicability. This Rule shall govern the procedures for a first petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 in which a petitioner seeks relief from a judgment imposing the penalty of death. A subsequent filing relating to a particular petition may be deemed a first petition under these Rules if the original filing was not dismissed on the merits. The application of this Rule may be modified by the

Judge or Magistrate Judge to whom the petition is assigned. These Rules shall supplement the Rules Governing § 2254 Cases and do not in any regard alter or supplant those rules.

(b) Notices From California Attorney General. The California Attorney General shall send to the Clerk (1) prompt notice whenever the California Supreme Court affirms a sentence of death; (2) at least once a month, a list of scheduled executions; and (3) at least once a month, a list of the death penalty appeals pending before the California Supreme Court.

(c) Notice From Petitioner's Counsel. Whenever counsel determines that a petition will be filed in this Court, counsel shall promptly file with the Clerk and serve on the California Attorney General a written notice of counsel's intention to file a petition. The notice shall state the name of the petitioner, the district in which the petitioner was convicted, the place of petitioner's incarceration, and the status of petitioner's state court proceedings. The notice is for the information of the Court only, and the failure to file the notice shall not preclude the filing of the petition.

(d) Counsel.

(1) *Appointment of Counsel*. Each indigent petitioner shall be represented by counsel unless petitioner has clearly elected to proceed pro se and the Court is satisfied, after hearing, that petitioner's election is intelligent, competent and voluntary. Unless petitioner is represented by retained counsel, counsel shall be appointed in every case at the earliest practicable time. A panel of attorneys qualified for appointment in death penalty cases will be certified by a selection board appointed by the Chief Judge. This board will consist of a federal defender, a member of the California Appellate Project (CAP), a member of the State Bar, and a representative of the state public defender.

When a death judgment is affirmed by the California Supreme Court and any subsequent proceedings in the state courts have concluded, California Appellate Project will forward to the selection board the name of state appellate counsel and, if counsel is willing to continue representation on federal habeas corpus, California Appellate Project's evaluation of counsel's performance in the state courts, and recommendation on whether counsel should be appointed in federal court.

If state appellate counsel is available to continue representation into the federal courts, and counsel is deemed qualified to do so by the selection board, there is a presumption in favor of continued representation except when state appellate counsel was also counsel at trial.

In light of this presumption, it is expected that appointed counsel who is willing to continue representation and who has been certified by the selection board as qualified to do so, would ordinarily file a motion for appointment of counsel on behalf of his or her client together with the client's federal habeas corpus petition. If, however, counsel for any reason wishes to confirm appointment before preparing the petition, counsel may move for appointment as described above, before filing the petition.

If state appellate counsel is not available to represent petitioner on federal habeas corpus or if appointment of state appellate counsel would be inappropriate for any reason, the Court shall appoint counsel upon application of petitioner. The Clerk shall have available forms for such application. Counsel shall be appointed from the panel of qualified attorneys certified by the selection board. Either California Appellate Project or the selection board may suggest one or more counsel for appointment. The Court may also request suggestion from California Appellate Project or the selection board. If application for appointed counsel is made before a petition is filed, the application shall be assigned to a Judge and Magistrate Judge in the same manner that a petition would be assigned, and counsel shall be appointed by the Magistrate Judge. The Judge and Magistrate Judge so assigned shall be the Judge and

Magistrate Judge assigned when counsel files a petition for writ of habeas corpus.

(2) *Second Counsel.* Appointment and compensation of second counsel shall be governed by Section 2.11 of Volume VII of the Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases.

(e) Filing. Petitions as to which venue lies in this District shall be filed in accordance with Local Rules 120 and 190. Petitions shall be filled in by printing or typewriting. In the alternative, the petition may be in a legible typewritten or written form which contains all of the information required by that form. All petitions (1) shall state whether petitioner has previously sought relief arising out of the same matter from this Court or any other federal court, together with the ruling and reasons given for denial of relief; (2) shall set forth any scheduled execution date; and (3) shall contain the wording in full caps and underscored "**DEATH PENALTY CASE**" directly under the case number on each pleading. An original and three (3) copies of the petition shall be filed by counsel for petitioner. A pro se petitioner need file only the original. No filing fee is required.

The Clerk will immediately notify the California Attorney General's Office when a petition is filed.

When a petition is filed by a petitioner who was convicted outside of this District, the Clerk will immediately advise the Clerk of the District in which the petitioner was convicted.

(f) Assignment to Judges. Notwithstanding the general assignment plan of this Court, petitions shall be assigned to Judges of the Court as follows: (1) the Clerk shall establish a separate category for these petitions, to be designated with the title "Capital Case"; (2) all active Judges of this Court shall participate in the assignments; (3) petitions in the Capital Case category shall be assigned blindly and randomly by the Clerk to each of the active Judges of the Court; (4) if the assigned Judge

has filed a Certificate of Unavailability with the Clerk which is in effect on the date of the assignment, a new random assignment will be made to another Judge immediately; (5) if a petitioner has previously sought relief in this Court with respect to the same conviction, the petition will be assigned to the Judge who was assigned to the prior proceeding; and (6) pursuant to 28 U.S.C. § 636(b)(1)(B), and not inconsistent with law, Magistrate Judges may be designated by the Court to perform all duties under these Rules, including evidentiary hearings.

(g) Transfer of Venue. Subject to the provisions of 28 U.S.C. § 2241(d), it is the policy of this Court that a petition should be heard in the District in which petitioner was convicted rather than in the District of petitioner's present confinement.

If an order for the transfer of venue is made, the Judge will order a stay of execution which shall continue until such time as the transferee court acts upon the petition or the order of stay. The issuance of a stay in the transferee court shall be determined under paragraph (h) of this Rule.

(h) Stays of Execution.

(1) *Stay Pending Final Disposition*. Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the District Court shall issue a stay of execution pending final disposition of the matter.

(2) *Temporary Stay for Appointment of Counsel*. Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection board will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application, the Court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days

unless extended by the Court.

(3) *Temporary Stay for Preparation of the Petition*. Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the Court upon a subsequent showing of good cause.

(4) *Temporary Stay for Transfer of Venue*. (See paragraph (g).)

(5) *Temporary Stay for Unexhausted Claims*. If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

(6) *Stay Pending Appeal*. If the petition is denied and a certificate of probable cause for appeal is issued, the Court will grant a stay of execution which will continue in effect until the court of appeals acts upon the appeal or the order of stay.

(7) *Notice of Stay*. Upon the granting of any stay of execution, the Clerk will immediately notify the warden of San Quentin Prison and the California Attorney General. The California Attorney General shall ensure that the Clerk has a twenty-four (24) hour telephone number to the warden.

(i) Procedures for Considering the Petition. Unless the Judge summarily dismisses the petition under Rule 4 of the Rules Governing § 2254 Cases, the following schedule and procedures shall apply subject to modification by the Court.

Requests for enlargement of any time period in this Rule shall comply with the applicable Local Rules of the Court.

(1) Respondent shall as soon as practicable, but in any event on or before twenty (20) days from the date of service of the petition, lodge with the Court the following: (A) transcripts of the state trial court proceedings; (B) appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that Court; (C) petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings; (D) copies of all pleadings, opinions and orders in any previous federal habeas corpus proceeding filed by petitioner which arose from the same conviction; and (E) an index of all materials described in paragraphs (A) through (D) above. Such materials are to be marked and numbered so that they can be uniformly cited. Respondent shall serve this index upon counsel for petitioner.

If any items identified in paragraphs (A) through (D) above are not available, respondent shall state when, if at all, such missing material can be lodged.

(2) If counsel for petitioner claims that respondent has not complied with the requirements of paragraph (1), or if counsel for petitioner does not have copies of all the documents lodged with the Court in writing, with a copy to respondent, counsel for petitioner shall immediately notify the Court in writing, with a copy to respondent. Copies of any missing documents will be provided to counsel for petitioner by the Court.

(3) Respondent shall file an answer to the petition with accompanying points and authorities within thirty (30) days from the date of service of the petition. Respondent shall include in the answer the matters defined in Rule 5 of the Rules Governing § 2254 Cases and shall attach any other relevant documents not already filed or lodged.

(4) Within thirty (30) days after respondent has filed the answer, petitioner may file a traverse.

(5) No discovery shall be had without leave of the Court.

(6) Any request for an evidentiary hearing by either party shall be made within fifteen (15) days from the filing of the traverse, or within fifteen (15) days from the expiration of the time for filing the traverse. The request shall include a specification of which factual issues require a hearing and a summary of what evidence petitioner proposes to offer. Any opposition to the request for an evidentiary hearing shall be made within fifteen (15) days from the filing of the request. The Court will then give due consideration to whether an evidentiary hearing will be held.

(j) Evidentiary Hearing. If an evidentiary hearing is held, the Court will order the preparation of a transcript of the hearing, which is to be immediately provided to petitioner and respondent for use in briefing and argument. Upon the preparation of the transcript, the Court may establish a reasonable schedule for further briefing and argument of the issues considered at the hearing.

(k) Rulings. The Court's rulings may be in the form of a written opinion which will be filed, or in the form of an oral opinion on the record in open court, which shall be promptly transcribed and filed.

The Clerk will immediately notify the warden of San Quentin Prison and the California Attorney General whenever relief is granted on a petition.

The Clerk will immediately notify the Clerk of the United States Court of Appeals for the Ninth Circuit by telephone of (1) the issuance of a final order denying or dismissing a petition without a certificate of probable cause for appeal, or (2) the denial of a stay of execution.

When a notice of appeal is filed, the Clerk will transmit the appropriate documents to the United States Court of Appeals for the Ninth Circuit immediately.

Eff. Dec. 19, 1994.

Supreme Court, U.S.
FILED
NOV 13 2002
CLERK

(5)

No. 01-1862

IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

ROBERT FREDERICK GARCEAU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What is the correct triggering event for application of AEDPA to capital cases?

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IN THE

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

vs.

ROBERT FREDERICK GARCEAU,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the right of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state court based on arguments fully considered and fairly resolved there, well within the limits in which reasonable, conscientious judges can differ. By a tenuous

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

extrapolation of this Court's decisions, the Ninth Circuit continues to substitute its own, often erroneous, judgment for such decisions over six years after Congress ordered a halt to this practice. Such unwarranted attacks on final judgments are contrary to the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On September 6 or 7, 1984, Robert Garceau stabbed to death his girlfriend, Maureen Bautista, in the presence of her 14-year-old son, Telesforo, in an apartment in Bakersfield, California. *People* v. *Garceau*, 6 Cal. 4th 140, 156, 862 P. 2d 664, 670 (1993). Garceau next murdered Telesforo. Two of Garceau's acquaintances, Greg Rambo and Larry Tom Whittington, concealed the bodies inside a bedroom dresser and transported the dresser to Rambo's residence in Shandon, California, where it was buried in Rambo's back yard under a layer of fresh concrete. *Id.*, at 156, 862 P. 2d, at 670-671. Five months after the murders and burial, Garceau murdered Greg Rambo. Prior to the trial in this case, he was convicted of murdering Rambo and sentenced to 33 years to life. *Id.*, at 156, n. 2, 862 P. 2d, at 671, n. 2.

The prosecution's case relied primarily upon Garceau's confessions to several people with whom he worked in the methamphetamine manufacturing business. See *id.*, at 157, 862 P. 2d, at 671. He killed Maureen Bautista because he feared that she would "snitch," and he killed her son because he had witnessed the murder of his mother. *Ibid.* Numerous witnesses testified to Garceau's intense hatred of snitches, including comments that they deserved to die. *Ibid.*

The defense primarily tried to undermine the credibility of the witnesses to Garceau's confessions. See *id.*, at 156, 862 P. 2d, at 671. A large part of this defense was the witnesses' "odd behavior, complicity, and deception in the aftermath of Greg Rambo's murder." *Id.*, at 163, 862 P. 2d, at 675. Therefore, the defense introduced evidence of the Rambo murder during its cross-examination of the prosecution's witnesses. The trial court instructed the jury that it could consider evidence of Garceau's other crimes " 'for any purpose, including . . . [his] character . . . .' " See *id.*, at 186, 862 P. 2d, at 690 (emphasis omitted).

The jury convicted Garceau on two counts of first-degree murder and found the special circumstance of multiple murder. *Id.*, at 155-156, 862 P. 2d, at 670. He was sentenced to death at the penalty phase. See *id.*, at 156, 862 P. 2d, at 670. The California Supreme Court unanimously affirmed the conviction and sentence. It held that the "other crimes" instruction was error under the state evidence code, but that even if this also violated due process, the error was harmless beyond a reasonable doubt. See *id.*, at 186-187, 862 P. 2d, at 692. The court also rejected Garceau's habeas petition on the merits. See *Garceau* v. *Woodford*, 275 F. 3d 769, 771 (CA9 2001). Garceau requested a stay of execution and appointment of counsel to pursue federal habeas corpus in federal district court on May 12, 1995. Counsel was appointed on June 26, 1995, and the habeas petition was filed over a year later, on July 2, 1996, after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *id.*, at 772, and n. 1.

The district court denied the habeas petition and declined to issue a certificate of probable cause. A divided panel of the Ninth Circuit reversed, holding that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) did not apply because under Ninth Circuit precedent the petition was "pending" as of the date that Garceau requested counsel. See *ibid.*, n. 1. It also held that the prior crimes instruction violated due process and that the error was not harmless. See *id.*, at 777. The Ninth Circuit denied rehearing en banc, see *Garceau* v. *Woodford*, 281 F. 3d 919 (CA9 2002), and this Court granted certiorari on October 1, 2002.

SUMMARY OF ARGUMENT

The present case is exactly the kind of case in which Congress decided not to allow the final judgment of a state court to be overturned in collateral proceedings. The California Supreme Court carefully considered the merits, applied the correct law, and reached an entirely reasonable and probably correct result. Yet the Ninth Circuit substituted its own, probably erroneous judgment six years after Congress's decision.

Under the general rules for commencement of actions, a habeas corpus proceeding commences and becomes pending when the petition is filed. Until there has been a statement of the claims and a demand for relief, the habeas case as such is not pending.

McFarland v. *Scott* and *Hohn* v. *United States* do not require the contrary result. *Slack* v. *McDaniel* recognized that a habeas case is not an indivisible whole. Just as an appellate case can be different from the district court case for the purpose of applicability of AEDPA, so can the habeas case proper be different from preliminary proceedings for appointment of counsel and stay.

Although it is not necessary to modify *McFarland* to find AEDPA applicable to this case, adoption of Justice O'Connor's position in that case would simplify the law. In that interpretation, a district court can appoint a lawyer to represent an inmate before a petition has been filed, but the case does not begin and a stay cannot issue until the petition is filed. Although Congress did not directly abrogate *McFarland* in AEDPA, the wording of the statute in several places indicates Congress's understanding that a habeas case commences with the petition.

ARGUMENT

I. The present case is precisely the kind of decision Congress intended to prevent by enacting AEDPA.

AEDPA was designed to prevent decisions such as the one in this case. The Ninth Circuit's holding centers on an error of state law, the instruction that the defendant's other crimes could be considered by the jury for any purpose. A state-law evidence error does not transform a jury instruction into a due process violation. "To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore* v. *Taylor*, 508 U. S. 333, 342 (1993). Whether state evidence law was violated "is no part of a federal court's habeas review of a state conviction." *Estelle* v. *McGuire*, 502 U. S. 62, 67 (1991). Due process is not a detailed code of procedure. See *Medina* v. *California*, 505 U. S. 437, 444 (1992). Even the admission of irrelevant evidence does not violate due process. See *Romano* v. *Oklahoma*, 512 U. S. 1, 10 (1994). Much more is necessary before due process is violated.

In *McGuire*, this Court declined to address whether allowing prior crimes evidence to prove a propensity to commit the charged offense violated due process. See 502 U. S., at 75, n. 5. In light of *McGuire* and its progeny, the case for a due process violation is unclear at best. See *People* v. *Garceau*, 6 Cal. 4th 140, 211, 862 P. 2d 664, 708 (1993) (Kennard, J., concurring). Since propensity evidence, even when improperly admitted, is relevant to guilt, see, *e.g.*, *Michelson* v. *United States*, 335 U. S. 469, 476 (1948); 1 J. Wigmore, Evidence § 58.1, p. 1211 (Tillers rev. 1983), the case for a due process violation from its improper admission evaporates. At worst, the prior crimes evidence poses an excessive risk of prejudicing the defendant in light of its probative value with respect to guilt. Due process violations require much more, as this Court has " 'defined the category of infractions that violate "fundamental fairness" very

narrowly.'" *McGuire*, *supra*, at 73 (quoting *Dowling* v. *United States*, 493 U. S. 342, 352 (1990)).

In *Spencer* v. *Texas*, 385 U. S. 554, 563 (1967), this Court held that other crimes evidence did not violate due process in a case where the jury was instructed not to consider it as evidence of guilt on the current charge. The Ninth Circuit relied on *Spencer* and two circuit court decisions predating *McGuire* to hold that prior crimes evidence without a limiting instruction like *Spencer*'s violates due process. See *Garceau* v. *Woodford*, 275 F. 3d 769, 774 (CA9 2001). After *McGuire*, these cases do not even support the Ninth Circuit's holding, let alone compel it. The opinion below is no more than a disagreement with a unanimous California Supreme Court over the scope of due process, with California's high court getting the better of the argument.

Even if there could be a due process violation, the error is harmless. Justice Mosk's concurrence points out that Garceau's numerous corroborated confessions eliminate any unconstitutional prejudice from the prior crimes evidence. He contrasts this case with the "general case" in which such use is prejudicial.

> "This, however, is *not* the general case. On several occasions and to several persons, defendant confessed that he committed the charged murders. By evidence both physical and testimonial, his confessions were corroborated.
>
> "It has been stated that a confession may have an 'indelible impact' on the jury, inducing it 'to rest its decision on that evidence alone, without . . . consideration of' the rest. (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 313 [113 L.Ed.2d 302, 333, 111 S.Ct. 1246, 1266] (conc. opn. of Kennedy, J.).)
>
> "If even a single confession may have such an 'indelible impact,' several confessions—as in this case—must practically compel the jury to return a guilty verdict no matter what the other evidence says or does not say." *People* v. *Garceau*, 6 Cal. 4th, at 210, 862 P. 2d, at 707 (Mosk, J., concurring) (emphasis in original).

Eleven judges have addressed this claim, and nine have rejected it. See 275 F. 3d, at 771 (claim denied by District Court); *id.*, at 781 (O'Scannlain, J., dissenting). When it adopted AEDPA, Congress rejected the premise that the federal court of appeals' answer to a legal question was necessarily better than the state supreme court's answer. See 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch).

On questions of law resolved on the merits in state court, Congress limited the lower federal courts to correcting judgments that were "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U. S. C. § 2254(d)(1). There is no clearly established law in this Court's precedents creating a federal constitutional rule against propensity evidence. *McGuire*, 502 U. S., at 75, n. 5, expressly reserved the question. A decision raising a rule of evidence to constitutional status is a "new rule," see *Sawyer* v. *Smith*, 497 U. S. 227, 239 (1990), and a rule which is "new" for the purpose of retroactivity is necessarily not "clearly established" for the purpose of § 2254(d)(1). See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Because there is no clearly established rule, the decision of the California Supreme Court cannot be contrary to or an unreasonable application of a nonexistent rule, and if AEDPA applies to this case, this claim must certainly be denied.

Landgraf v. *USI Film Products*, 511 U. S. 244, 259 (1994) noted, "Purely prospective application [of a statute] . . . would prolong the life of a remedial scheme . . . that Congress obviously found wanting." The Ninth Circuit has prolonged the life of the rejected pre-AEDPA remedial scheme to a preposterous duration. It continues to substitute its own judgment for the careful, considered, reasonable decisions of the California Supreme Court *six years* after Congress ordered it to cease and desist. See *Woodford* v. *Visciotti*, 537 U. S. __ (No. 02-137,

Nov. 4, 2002) (slip op., at 5) ("§ 2254(d)'s 'highly deferential standard' . . . demands that state court decisions be given the benefit of the doubt"). The central purpose of the reform, after all, was to curb delays. *Williams*, 529 U. S., at 404. By no stretch of the imagination could it be thought that Congress intended that its anti-delay legislation be delayed this long. The most basic respect for the legislative process requires that Congress's reforms be applied to this case.

II. A proceeding is "pending" for the purpose of *Lindh* v. *Murphy* when the petition is filed and not before.

"In *Lindh* v. *Murphy*, 521 U. S. 320 (1997), the Court held that AEDPA's amendments to 28 U. S. C. § 2254, the statute governing entitlement to habeas relief in the district court, applied to cases *filed* after AEDPA's effective date. 521 U. S., at 327." *Slack* v. *McDaniel*, 529 U. S. 473, 481 (2000) (emphasis added). The *Lindh* and *Slack* Courts understood "filed" to refer to "the date a *petition* was filed in the district court." *Id.*, at 482 (emphasis added). This was understood to be the date on which a habeas case became "pending," a term *Lindh* uses interchangeably with "filed." See, *e.g.*, 521 U. S., at 323.

In general, a case is commenced and becomes pending when the moving party files a document which identifies the claims made and specifies the relief requested. Authority on this point is somewhat sparse, apparently because it has long been nearly universally understood that filing a complaint or equivalent document marks the commencement of a case.

In re Connaway, 178 U. S. 421 (1900) is one of the few decisions of this Court on when an action begins so as to make it "pending."[2] Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire*

2. *McFarland* v. *Scott*, 512 U. S. 849 (1994) is discussed in part III, *infra*.

facias to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death because he had not been served. Connaway applied to the Supreme Court for a writ of mandamus.

> "When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced*, and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.
>
> "Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.[3] By section 405 of the Code of Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' By section 406 summons may be issued at any time within a year, and if necessary to different counties. The defendant may appear, however, at any time within a year. *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

Connaway thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the

3. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 1 J. Moore, Moore's Federal Practice § 1App.100, at 1App-4 (3d ed. 2002).

Federal Rules of Civil Procedure ("FRCP") is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court." *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 533 (1949) held that a suit was commenced under Rule 3 upon the filing of the complaint, although in that diversity case a different state rule governed for the purpose of the state statute of limitations.

The "complaint" in habeas corpus is the petition. Compare Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") ("specify all the grounds of relief . . .") with FRCP 8(a)(2) ("a short and plain statement of the claim . . ."). There are procedures in habeas corpus to dispose of insubstantial petitions. Habeas Rule 4 provides for prompt examination of the petition by the district judge and summary dismissal if it is meritless on its face. Under Habeas Rule 5, the respondent can answer the petition, and the answer " 'may demonstrate that the petitioner's claim is wholly without merit.' " Advisory Committee's Note on Habeas Rule 5 (quoting Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1083, 1178 (1970)). In that event, the petition can be denied without an evidentiary hearing. See Habeas Rule 8(a).

None of the procedures for "disposition of the petition," see *ibid.*, can be invoked until there is a petition. Until a claim of illegal detention and a demand for release (whether conditional or unconditional) have been stated, the essence of a habeas case is missing, *i.e.*, "a proceeding seeking relief for . . . wrongful detention in violation of the Constitution." *Hohn* v. *United States*, 524 U. S. 236, 241 (1998).

Baldwin County Welcome Center v. *Brown*, 466 U. S. 147 (1984) (*per curiam*), illustrates the minimum requirements to commence a case. In *Baldwin County*, would-be plaintiff Brown claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission

(EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, Brown filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. Brown returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

The District Court held that Brown had forfeited her right to judicial review by failing to file a complaint within the statutory time. Specifically, the court rejected the contention that the copy of the right-to-sue letter could be deemed a complaint. *Id.*, at 148-149. The Court of Appeals reversed on the theory that filing the letter "tolled" the statute. *Id.*, at 149. The Supreme Court reversed. *Ibid.*

First, this Court approved the District Court's ruling that the EEOC letter could not be deemed a complaint. This Court noted that under FRCP 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 because there was no statement in the letter of the factual basis for the claim of discrimination, which is required by the Rule." *Id.*, at 149. Upholding this ruling, this Court rejected the Court of Appeals' notion that civil rights plaintiffs were somehow exempt because of a special solicitude for this class of plaintiffs. *Id.*, at 149-150.

The complaint later filed, this Court went on to explain, could not "relate back" to the date of filing of the EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon

> which it rests.' [Citation.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id.*, at 150, n. 3 (emphasis added).

Baldwin holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading which commences a case. A mere application for counsel, or request for a stay, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by FRCP 8 but rather by 28 U. S. C. § 2241 and Habeas Rule 2. That rule establishes the requirements to commence a habeas case. It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown* v. *Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. FRCP 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury. See Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid.* The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 163-164 (1990).

In addition, Habeas Rule 2(c) retains "fact pleading" rather than the FRCP 8 "notice pleading." Advisory Committee's Note on Habeas Rule 4. Even the partisan Professor Liebman, who calls this requirement "anomalous," 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 11.6, p.

573, n. 3 (4th ed. 2001), grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is designed to review and draws heavily on the record of prior state proceedings . . . . Second, fact pleading . . . enables courts . . . to separate substantial petitions from insubstantial ones quickly and without need of adversary proceedings." *Ibid.* The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985); *id.*, at 62 (White, J., concurring).

In summary, there is an irreducible minimum below which a paper cannot commence a habeas case. It must serve the basic functions of identifying the claims and their factual basis and of specifying the relief requested. The first pleading that performs these functions is the petition.

III. A request for counsel and stay is a "distinct step" from the actual attack on the judgment, and the two are considered separately under the rule of *Slack* v. *McDaniel*.

In *Calderon* v. *United States District Court* (*Kelly*), 163 F. 3d 530 (CA9 1998) (en banc), the Ninth Circuit held that the inmate's filing of a request for counsel and stay was sufficient to make a habeas case "pending" for the purpose of determining whether AEDPA applies. See *id.*, at 540. The Ninth Circuit overruled its precedent to the contrary, *Calderon* v. *United States District Court* (*Beeler*), 128 F. 3d 1283, 1287, n. 3 (CA9 1997), because it believed that *Hohn* v. *United States*, 524 U. S. 236 (1998) required this result. See *Kelly*, 163 F. 3d, at 540.

All of the other circuits to address this issue have reached the opposite conclusion. See *Isaacs* v. *Head*, 300 F. 3d 1232, 1239 (CA11 2002); *Moore* v. *Gibson*, 195 F. 3d 1152 (CA10 1999); *Williams* v. *Coyle*, 167 F. 3d 1036, 1038 (CA6 1999); *Gosier* v. *Welborn*, 175 F. 3d 504, 506 (CA7 1999); *Williams* v. *Cain*, 125 F. 3d 269, 274 (CA5 1997).

A few years before *Lindh* v. *Murphy*, 521 U. S. 320 (1997) and the enactment of AEDPA, this Court decided *McFarland* v. *Scott*, 512 U. S. 849 (1994) regarding whether a district court had jurisdiction to appoint counsel and stay an execution before a habeas petition was filed. Under 21 U. S. C. § 848(q)(4)(B), a capital defendant in a post-conviction proceeding under 28 U. S. C. § 2254 or § 2255 has a statutory right to qualified legal representation. Under 28 U. S. C. § 2251, a federal judge before whom a habeas proceeding is pending has the power to stay any related state court proceeding. The lower courts in *McFarland* refused to appoint counsel for the defendant, because, at the time he filed his motion, he had yet to file his habeas petition. 512 U. S., at 853. This Court reversed, finding that under § 848(q)(4)(B) a capital defendant has a right to legal assistance in the preparation of a habeas application and that a post-conviction proceeding within the meaning of the statute is commenced when a capital defendant files a motion for appointment of counsel. *Id.*, at 856-857. Only after addressing that issue did this Court address whether a federal court has jurisdiction to stay a related state court proceeding under § 2251. This Court read the two statutes together and found that they use the terms "post conviction proceeding" and "habeas corpus proceeding" interchangeably, and that to effectuate a capital defendant's right to counsel, once a capital defendant invokes that right, a federal court has jurisdiction to enter a stay of execution even before he files a formal habeas petition. *Id.*, at 858.

McFarland is a decision driven by practical necessities, both real and perceived. The need to appoint counsel prior to the filing of the petition is quite real. *McFarland* notes the heightened pleading requirements and the procedures for summary dismissal. 512 U. S., at 856. Undoubtedly, "Congress . . . did not intend for the express requirement of counsel to be defeated" by the summary dismissal of a *pro se* petition. *Ibid.* *McFarland*'s stretch of when a proceeding was pending so as to authorize a stay was further driven by the conviction that the statutory right to counsel would be "meaningless"

unless that power existed before the filing of the petition. See *id.*, at 857. The validity of this premise is discussed in part IV, *infra*, but for now it is sufficient to recognize it as the driving force behind the decision. Where the reason for a rule ends, the rule should end. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). The dire consequences the *McFarland* Court feared are completely absent here, and its strained interpretation of § 2251 should be stretched no further.

Several years after *McFarland*, this Court decided *Hohn* v. *United States*, 524 U. S. 236 (1998). *Hohn* held that under AEDPA, a denial of an application for a certificate of appealability (COA) constitutes a "case" in the Court of Appeals which this Court has jurisdiction to review. *Id.*, at 239. This Court also rejected an argument that an application for a COA is a threshold matter separate from the merits which, if denied, prevents this Court from asserting jurisdiction over the matter. *Id.*, at 246. Focusing on the latter pronouncement, the Ninth Circuit interpreted *Hohn* to mean that pretrial motions for appointment of counsel and a stay of execution under *McFarland* are threshold matters constituting a "case" in the district court, thereby commencing a habeas proceeding. *Kelly*, 163 F. 3d, at 540. This interpretation extrapolates *McFarland* and *Hohn* too far. See *Williams* v. *Coyle*, 167 F. 3d, at 1040.

Neither *McFarland* nor *Hohn* directly address the issue presented in this case of when a habeas proceeding is commenced for the purpose of determining the applicable law. Rather, the holdings of those cases simply relate to jurisdiction. Essentially, under *McFarland*, a court has jurisdiction to enter a stay of execution once a motion for appointment of counsel is filed, and under *Hohn*, this Court has jurisdiction to review a denial of an application for a COA. In *Kelly*, the Ninth Circuit stretched the holdings of those two cases a step further to find that when a capital defendant files a pretrial motion for appointment of counsel, that commences a habeas proceeding so that a case is "pending," thereby rendering a subsequent act of Congress inapplicable. According to the Ninth Circuit, because

a case is "pending" when a motion of appointment of counsel is filed, AEDPA is not applicable even if the actual habeas petition, which is the only method of attacking the judgment against the capital defendant, is filed *after* AEDPA's effective date.

While *Kelly*'s extrapolation of *McFarland* and *Hohn* may have seemed plausible at the time, it is no longer so after *Slack* v. *McDaniel*, 529 U. S. 473 (2000). The issue in *Slack*, which is strongly analogous to the issue in this case, was whether pre- or post-AEDPA rules applied to an appeal filed pursuant to 28 U. S. C. § 2253 after AEDPA's effective date in a case where the defendant's original habeas petition was filed in the district court before AEDPA's effective date. This Court held that *post*-AEDPA rules apply to jurisdiction to hear appeals in these circumstances. 529 U. S., at 481-482.

Slack argued that under *Lindh*, post-AEDPA rules relating to applications for a COA did not apply to him because his habeas petition was filed in the district court before AEDPA became effective. *Id.*, at 481. The *Slack* Court recognized that in *Hohn*, this Court also applied post-AEDPA law to Hohn's appeal even though Hohn's original habeas petition was filed before the Act's effective date, implicitly rejecting Hohn's argument to the contrary. See *Slack*, 529 U. S., at 482 (citing Brief for Petitioner in *Hohn* v. *United States*, O. T. 1997, No. 96-8986, pp. 40-44). *Slack* made explicit what was implicit in *Hohn*:

> "*While an appeal is a continuation of the litigation started in the trial court, it is a distinct step. Hohn* v. *United States*, 524 U. S. 236, 241 (1998); *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U. S. 131 (1924). . . . *Under AEDPA, an appellate case is commenced when the application for a COA is filed. Hohn, supra*, at 241. When Congress instructs us (as *Lindh* says it has) that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court. Thus, § 2253(c) governs

> appellate court proceedings filed after AEDPA's effective date." *Slack*, 529 U. S., at 481-482 (emphasis added).

Slack recognized that it is not necessary to view all proceedings relating to a habeas petition as an inseparable whole. Rather, those proceedings are divisible for purposes of the effective date of AEDPA. In the context of this case, *Slack* indicates that although filing pretrial motions for appointment of counsel and a stay of execution may initiate a "proceeding" of some kind, the actual filing of the habeas petition, like the actual filing of the application for a COA, is a "distinct step."

Slack also recognized that a court must consider the relevant case before it in order to determine the applicable law. Here, the statute that provides state prisoners with the right to collaterally attack criminal judgments via the writ of habeas corpus is 28 U. S. C. § 2254. Thus, only when a state prisoner files an application for a writ of habeas corpus in federal court is § 2254 triggered. See 28 U. S. C. § 2254(a) ("The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an *application* for a writ of habeas corpus . . ." (emphasis added)); see also 28 U. S. C. § 2254(e)(1) ("In a proceeding *instituted by an application for a writ of habeas corpus* . . ." (emphasis added)); 28 U. S. C. § 2242 (written application, statement of facts required); Habeas Rule 2 (petition requirements). *Slack* ties the applicability of each statute to the date the petitioner sought relief under that statute. The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal. "Because Slack sought appellate review two years after AEDPA's effective date, [amended] § 2253(c) governs his right to appeal." 529 U. S., at 482. In exactly the same way, new § 2254(d) establishes a new prerequisite for a collateral attack on a state conviction. It should govern any case where the petitioner first asked the federal court to overturn that judgment after AEDPA's effective date.

This Court's recent opinion in *Carey v. Saffold*, 536 U. S. __, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002) when contrasted

with *Hohn* and *Slack*, illustrates that what constitutes a single case in one context does not necessarily constitute a single case in another context. In *Carey*, this Court found that an application for state collateral review is "pending," as that term is used in 28 U. S. C. § 2244(d)(2), from the time between the initial filing in the trial court on a state habeas petition and the disposition by the highest state court, including the periods of time in the middle in which no court was actually considering the case. *Id.*, 153 L. Ed. 2d, at 268, 122 S. Ct., at 2138. That was true even with respect to California's unique system of filing a separate, original state habeas petition at each step of the state collateral review process.

In *Hohn* and *Slack*, on the other hand, this Court recognized a distinction between a federal habeas case at the trial court level and a federal habeas case at the appellate court level. In that situation, this Court has found that a federal habeas case is not a single case from beginning to end. Rather, the proceeding is divisible for purposes of what law to apply. Like *Hohn* and *Slack*, not only is there a divisible point between the habeas petition filed at the trial court level and an application for a COA filed at the appellate court level, but there is a similar divisible point between the time of pre-petition motions and the filing of the actual habeas petition. By filing a federal habeas petition, a capital defendant has then, and only then, taken the relevant step of commencing the process of collateral attack on the judgment.

Even before *Slack*, the Ninth Circuit was alone in its conclusion that a habeas case is "pending" for the present purpose from the point pretrial motions for appointment of counsel and a stay of execution are filed. The other circuits which have addressed this issue had all reached the opposite conclusion. See *supra*, at 13. After *Slack*, the Eleventh Circuit joined the others. See *Isaacs* v. *Head*, 300 F. 3d 1232, 1242 (CA11 2002). The court in *Isaacs* found that neither *McFarland* nor *Hohn* directed the result advanced by the defendant, which was that reached by the Ninth Circuit. *Id.*, at 1239.

Isaacs found that *McFarland* was only concerned with interpreting and giving effect to two narrow statutory provisions, and finding that a habeas case is pending from the moment pretrial motions are filed would be a stretch at best. *Id.*, at 1245. The court also found that *Hohn* was limited to the narrow question of jurisdiction. *Ibid.* Thus, the *Isaacs* court found that although filing a pretrial motion for appointment of counsel may initiate a "case," it does not commence a habeas proceeding under § 2254. *Ibid.* Instead the court looked to *Slack* to find a dividing line between filing pretrial motions and filing a habeas petition. In doing so, the court stated,

> "A motion for appointment of counsel has no relation to the merits of a habeas petition and does not seek any form of merits relief from a district court. Such a motion does not even assure that a habeas case will ever materialize. . . . Furthermore, the Supreme Court's opinion in *Slack* supports the idea that all proceedings that have any relation to a habeas petition do not have to be viewed as a unified whole for purposes of AEDPA. Instead, *Slack* expressly recognized that a court, in order to determine the applicable law, must determine what is 'the relevant case.' *Slack*, [529 U. S.,] at 482, 120 S. Ct., at 1603. We believe that it follows—from the Supreme Court's recognition that an appellate case may be subject to AEDPA even though the underlying district court proceedings were not—that even though a motion for appointment of counsel was filed before AEDPA and was not subject to its provisions, a later filed habeas petition may nonetheless be governed by the stricter AEDPA standards that took effect in the interim." 300 F. 3d, at 1245-1246.

The other circuits reached the same conclusion as the Eleventh Circuit purely by distinguishing *McFarland* and *Hohn*. The addition of *Slack* to the analysis makes the conclusion reached by the majority of the circuits even stronger, refuting the notion that *McFarland* is controlling.

Further strengthening the proposition that pretrial motions relating to a habeas petition are divisible from the habeas case itself are *United States* v. *Mine Workers*, 330 U. S. 258 (1947) and *United States* v. *Shipp*, 203 U. S. 563 (1906). In those cases, this Court held that until a court announces its judgment regarding whether it has jurisdiction over the merits of the case, it has the authority to grant a stay to preserve the status quo. The parties must comply with that order or they risk being held in contempt of court. *Mine Workers*, *supra*, at 293; *Shipp*, *supra*, at 573. The defendants in those cases had contended that if the court lacked jurisdiction over the underlying action, it also lacked jurisdiction to grant preliminary injunctive relief. The injunctions were therefore void, the argument went, and could be disregarded with impunity. See *Mine Workers*, *supra*, at 290; *Shipp*, *supra*, at 572. The Court rejected the argument in both cases.

The rule of *Mine Workers* and *Shipp* advances the premise that distinct portions of a proceeding are divisible for purposes of what law is applicable. In those cases, the parties were required to comply with a separate preliminary stay order of the court until informed otherwise. The question of whether the court had jurisdiction to review the underlying proceeding is distinct from the law applicable to the preliminary order. It thus follows that a preliminary order and a decision on the merits are distinct. If a court can have jurisdiction over one and not the other, then they need not be "pending" at the same time.

In short, *Slack* establishes that *McFarland* and *Hohn* are not controlling of the present question. The commencement of a habeas case should be governed by the same rules that govern the commencement of any other case. For the reasons stated in part II, *supra*, the commencement is the filing of the habeas petition, and not any pre-filing event.

IV. An alternative resolution would be to adopt Justice O'Connor's position in *McFarland*.

As discussed in part III, *supra*, the holding in *McFarland* v. *Scott*, 512 U. S. 849, 858 (1994) regarding prefiling stay jurisdiction is not necessarily inconsistent with the understanding expressed in *Slack* v. *McDaniel*, 529 U. S. 473 (2000), that the applicability of amended 28 U. S. C. § 2254 depends on the date of filing of the habeas corpus petition. See *id.*, at 478, 481. However, a cleaner, simpler, and more consistent definition of when a case is pending could be formed by adopting Justice O'Connor's position in *McFarland*. Under this view, a single definition of commencement and pending would apply to both § 2251 and § 2254, to both capital and noncapital habeas, and to habeas consistently with civil cases. See, *e.g.*, *In re GTE Service Corp.*, 762 F. 2d 1024, 1026 (D.C. Cir. 1985) (no stay of agency order before petition for review, no petition pending). At the same time, the legitimate needs of capital habeas litigation would be met.

The statutory right to appointment of capital habeas counsel in 21 U. S. C. § 848(q)(4)(B) can easily be extended to prefiling assistance without doing violence to the definition of when a case is commenced. The words "commenced" and "pending" do not occur in this statute. It provides, "In any post conviction proceeding under section 2254 . . . [in a capital case], any [indigent] defendant . . . shall be entitled to the appointment of one or more attorneys . . . ." No great stretch is required to say that an attorney for the moving party is representing the party "in" a proceeding while drafting the pleading that initiates that proceeding. A civil plaintiff would say he has hired a lawyer to represent him *in* his lawsuit from the moment the representation agreement is made, not just after the complaint is filed. Construing representation in a proceeding to include precommencement representation does less violence to the statutory language than altering long-established understandings of when a proceeding commences, and it achieves the same practical result.

The same is not true of the stay power, however. On its face, § 2251 applies only when a "habeas corpus proceeding is pending . . . ." Construing this statute to authorize prefiling stays is inconsistent with the fact that Congress uses different language to expressly grant such authority when it considers it necessary. See *McFarland*, 512 U. S., at 861 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing 28 U. S. C. § 2101(f)); see also 28 U. S. C. § 2262(a)).

Nor is there a genuine practical necessity for a prefiling stay. Given a right to prefiling counsel, "prisoners can avoid the need for a stay by filing a prompt request for appointment of counsel well in advance of the scheduled execution." *Id.*, at 863.

Even if counsel is not appointed until shortly before a scheduled execution date, filing a federal habeas petition does not take long. Every defendant has a constitutional right to counsel on direct appeal, see *Douglas* v. *California*, 372 U. S. 353, 357 (1963). Although not constitutionally required to do so, see *Murray* v. *Giarratano*, 492 U. S. 1, 3-4 (1989), every state except Georgia now provides counsel on state postconviction review in capital cases. See Appendix A. With an appellate brief and a postconviction petition both prepared by counsel, it is no great difficulty to extract the federal claims and put them in the form of a § 2254 petition.

When the initial petition has been prepared in haste due to an impending execution, the district court can and should allow an amendment within a month or two to add any additional claims unknown or overlooked at first. Petitioner can amend as of right before the answer. See 28 U. S. C. § 2242 (civil rules apply to amendments); Fed. Rule Civ. Proc. 15(a). After the answer, "leave shall be freely given when justice so requires," Rule 15(a), which it surely does for a reasonably prompt amendment to an emergency petition. Even in Georgia, where there may not have been a counsel-prepared state post-conviction petition, the amendment rule can be applied generously enough to make up for this deficiency in any case where an

impending execution really does give counsel only a few days to prepare the petition.[4]

McFarland "by no means grants capital defendants a right to an automatic stay of execution." 512 U. S., at 858. An attorney who can state a case sufficient to warrant a stay, see *id.*, at 860-861 (opinion of O'Connor, J.), can also draft a petition sufficient to preclude immediate dismissal, and then amend it in a month or two.

It is true, of course, that *stare decisis* is a particularly weighty consideration in matters of statutory interpretation where there has not been " 'any intimation of Congressional dissatisfaction . . . .' " *Ankenbrandt* v. *Richards*, 504 U. S. 689, 700 (1992). This case, however, does not fit neatly into that category. While Congress has not abrogated the stay portion of *McFarland*, it has indicated a contrary view of when a habeas corpus proceeding commences.

Legislating specifically on the issue of pre-filing stays in Chapter 154, Congress provided that an execution ". . . shall be stayed upon application to any court that *would have* jurisdiction over any proceedings filed under section 2254." 28 U. S. C. § 2262(a) (emphasis added). The words "would have" are significant and cannot be ignored. The subsection is carried forward without substantial change from the Powell Committee's pre-*McFarland* proposal. See 135 Cong. Rec. 24,693, col. 3 (1989).

If Congress accepted the notion that an application for a stay is sufficient to commence a § 2254 proceeding, the words "would have" would not be there. Congress understood, as the Powell Committee understood, that a § 2254 proceeding

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4. Stricter rules apply to cases governed by Chapter 154, see 28 U. S. C. § 2263(b)(3)(B); *Calderon* v. *Ashmus*, 523 U. S. 740, 750 (1998) (Breyer, J., concurring), but that chapter also provides for a pre-filing stay. See 28 U. S. C. § 2262(a).

commences and jurisdiction attaches when the petition is filed, not when a stay request is made.

Congress did not go out of its way to abrogate *McFarland* because, in all likelihood, it believed that most if not all capital habeas cases would be governed by Chapter 154 within a couple of years. Amending § 2251 to say even more clearly what it already says clearly enough was simply not considered important given the expectation that Chapter 153 stays of execution would shortly vanish from the scene.

Congress similarly tied commencement to the application in the new statutes of limitation. See 28 U. S. C. §§ 2244(d)(1), 2255, 2263(a). All three unambiguously refer to the § 2254 application or § 2255 motion as the filing subject to the limitation, not any pre-application motions. Only by ignoring the clear statutory language could a court come to the contrary conclusion. The Ninth Circuit did not do so in *Kelly*, see *Dennis* v. *Woodford*, 65 F. Supp. 2d 1093, 1094-1095 (ND Cal. 1999), and apparently neither it nor any other court has done so since.[5]

Between Congress's clearly expressed understanding in § 2262, the lack of any compelling necessity for prefiling stays, and the virtues of consistency, the best solution is to simply abandon *McFarland*'s strained interpretation of "pending." A habeas proceeding under § 2254 commences and becomes pending when the petition is filed and not before.

Simply put, *McFarland* could have achieved the practical result needed with a cleaner and simpler approach. Although it is not necessary to modify *McFarland* to hold AEDPA applicable to this case, doing so would simplify one corner of a notoriously complex body of law. The simple solution is that

5. Hertz and Liebman are unable to cite any cases that actually support their characteristically expansive interpretation. See 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 5.2b, p. 268, n. 84 (4th ed. 2001).

a habeas case is commenced upon the filing of the petition, but 21 U. S. C. § 848(q) authorizes precommencement appointment of counsel. A single commencement date, consistent with civil practice, would then govern stays, application of AEDPA, and the statute of limitations in all habeas cases, capital and noncapital.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

November, 2002

Respectfully submitted,

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Attorney for Amicus Curiae
Criminal Justice Legal Foundation

The following statutes expressly provide for appointment of counsel:

Ariz. Rev. Stat. Ann. §§ 13-4041(B), 13-4234(D) (2000)

Ark. Code Ann. § 16-91-202(a)(1) (Supp. 2001)

Cal. Gov't Code § 68662 (West Supp. 2002)

Colo. Rev. Stat. § 16-12-205 (2002)

Conn. Gen. Stat. § 51-296(a) (Supp. 2002)

Fla. Stat. Ann. § 27.702(1) (1997)

Idaho Crim. Rules 44.2 (2002)

725 Ill. Comp. Stat. Ann. § 5/122-2.1(a)(1) (1993)

Ind. Code Ann. § 33-1-7-2(a) (1995)

Kan. Stat. Ann. § 22-4506 (Supp. 2001)

Ky. Rev. Stat. Ann. § 31.110(2)(c) (Banks-Baldwin 2001)

La. Rev. Stat. Ann. § 15:149.1 (West Supp. 2002)

Md. Crim. Pro. Code Ann. § 7-108 (2001)

Miss. Code. Ann. § 99-39-23(9) (2002)

Mo. Sup. Ct. Rule 29.15(e) (2002)

Mont. Code Ann. § 46-21-201 (2001)

Nev. Rev. Stat. Ann. § 34.820 (2002)

N. H. Rev. Stat. Ann. § 604-A:2 (Supp. 2002)

N. J. Stat. Ann. § 2A:158A-5 (West 2002)

N. M. Stat. Ann. §§ 31-11-6, 31-16-3 (2002)

N. Y. Jud.. Law § 35-b (McKinney 2001)

N. C. Gen. Stat. § 7A-451(a)(2) (2001)

Ohio Rev. Code Ann. §§ 120.16, 120.26 (2001)

Okla. Stat. Ann. Tit. 22, § 1355.6(B) (Supp. 2003)

Or. Rev. Stat. § 138.590 (2001)

Pa. R. Crim. P., Rule 904, Pa. C. S. A. (Purdon 2001)

S. C. Code Ann. § 17-27-160(B) (Supp. 2001)

S. D. Codified Laws § 21-27-4 (1997)

Tenn. Code Ann. § 40-30-207 (1997)

Tex. Crim. P. Code Ann. § 11.071(2)(a) (2002)

Utah Code Ann. § 78-35a-202 (2002)

Va. Code Ann. § 19.2-163.7 (Supp. 2002)

Wash. Rev. Code Ann. § 10.73.150 (2002)

Wyo. Stat. § 7-6-104(c)(ii) (2001)

The following statutes are discretionary on their face, but the attorneys general of the respective states inform us that the practice is to always appoint counsel in capital cases:

Ala. Code § 15-12-23(a) (Supp. 2001)

Del. Superior Ct. Crim. Rule 61(l)(3) (2002)

Neb. Rev. Stat. Ann. § 29-3004 (Supp. 2001)

Supreme Court U.S.
FILED
DEC 16 2002
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01-1862

In The
Supreme Court of the United States

JEANNE WOODFORD,
WARDEN OF SAN QUENTIN STATE PRISON
Petitioner,
v.

ROBERT F. GARCEAU,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Dated: December 16, 2002

BEST AVAILABLE COPY

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS* CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS*[1]

The Association of the Bar of the City of New York ("the Association") is a professional association of approximately 21,000 attorneys. Much of the Association's work is accomplished through approximately 180 committees. One of these is dedicated to issues related to capital punishment. This attention to the death penalty reflects the fact that the justice system can do nothing more consequential than to take a life. Thus, the Association has long been concerned with the death penalty and has taken the lead in analysis of resulting practical and legal issues. *See, e.g.*, Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 Record Assoc. Bar 129 (2000); Committee on Civil Rights, *Legislative Modification of Habeas Corpus in Capital Cases*, 44 Record Assoc. Bar 848 (1989); Committee on Civil Rights, *The Death Penalty*, 39 Record Assoc. Bar 419 (1984).

With the attached consent of the parties, the Association as *amicus curiae* is filing this brief for a limited purpose: We urge this Court to reject the suggestion made by another *amicus*, the Criminal Justice Legal Foundation, that this Court overrule its decision in *McFarland v. Scott*, 512 U.S. 849 (1993), and limit the time within which capital defendants in

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[1] Pursuant to Rule 37.6, this brief was authored, prepared and paid for in its entirety by the Association of the Bar of the City of New York.

state court can move for stay of execution. The issue was not fairly subsumed within the question presented to this Court, and adopting the Foundation's suggestion would unnecessarily restrict the ability of federal courts to stay the execution of capital defendants in state court.

ARGUMENT

THIS COURT SHOULD NOT CONSIDER THE QUESTION OF THE TIMELINESS OF MOTIONS FOR STAYS OF EXECUTION UNDER 28 U.S.C. § 2251

In a highly unusual move, the Criminal Justice Legal Foundation as an *amicus* made a suggestion to this Court (at the very end of its brief, at pp. 21-25) asking this Court to go far beyond the question presented and to adopt a new rule relating to death penalty filings. The Foundation suggested that this Court overrule *McFarland v. Scott,* 512 U.S. 849 (1993), which held that a request for counsel by a capital defendant in state court and a request for a stay of execution under 28 U.S.C. § 2251 may be made before the formal filing of a *habeas* corpus petition under 28 U.S.C. § 2254. The Foundation urged this Court to adopt what it called "a single commencement date" for *habeas* petitions (which would not be uniform in any event since it is clear that 21 U.S.C. § 848(q)(4)(B) requires a different timetable for appointment of counsel in such cases).

There is no merit in the Foundation's argument. Among other reasons, Congress did not alter this Court's *McFarland* holding when it passed the AEDPA, even though it totally revised the procedure

for filing *habeas corpus* petitions. The timetable for motions under Section 848 and 2251 (both of which predated the AEDPA) remains the same pursuant to this Court's ruling in *McFarland*, and they were not modified by Congress, indicating Congressional approval of the timetable already established in *McFarland*.

More importantly, here it is inappropriate for the *amicus*, or a party for that matter, to go so far beyond the limits of the question presented to this Court in this case. That question was a simple one: "What is the correct triggering date for application of the AEDPA for capital cases."

The question of when a motion for a stay of execution and a request for counsel must be made is in no way subsumed within that question. This Court has emphasized that new questions should not be examined by this Court, particularly if the issues were not considered below. "These arguments were not presented to the courts below. They are not expressly among the questions presented in the petition for certiorari and are only arguably subsumed by the questions presented." *McCormick v. United States*, 500 U.S. 257, 269 n. 6 (1991).

The issue of when a request for counsel or a request for a stay of execution must be filed cannot be considered even arguably within the question presented here. In this case, Respondent filed his request for a stay of execution and for counsel before the filing of the *habeas corpus* writ, in accordance with this Court's decision in *McFarland*. *See* decision below, *Garceau v. Woodford*, 275 F.3d 769, at 772. No issue was raised concerning the timeliness of those

filings and therefore there is no "case or controversy" concerning that issue. It was only because the *habeas* petition was filed after the AEDPA went into effect that any issue of timeliness is present. With no argument or lower court consideration, we respectfully submit that it would be inappropriate to consider the overruling of such a "life and death" precedent such as *McFarland*.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: 16 December 2002
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